# Negotiating Solutions to Workplace Conflict: an Evaluation of the Public Service Staff Relations Board Pilot Grievance Mediation Project

**Final Report**

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# Negotiating Solutions to Workplace Conflict: an Evaluation of the PSSRB Pilot Grievance Mediation Project Final Report

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## Executive Summary

The PSSRB's pilot mediation project has achieved a high degree of credibility and party satisfaction with a large majority of participants indicating that they considered the process to be a fair and constructive approach to dispute resolution. An overwhelming majority also said that in the future they would be willing to participate in mediation at the PSSRB should the need arise. Mediated outcomes have included practical solutions that were not otherwise available through the Board's adjudicative proceedings and both grievors and employers report a greater interest in using informal dispute resolution processes in the future.

### Information and Logistics

While responses from all user groups to questions regarding sufficiency of information suggest a very high level of satisfaction with the presentation and organization of the mediation process, comments suggest that all categories of participants (and especially grievors) would have appreciated more information earlier in the process.Since employers, employer representatives and grievors are unlikely to have the same level of repeat participation in the process as the grievor representative, this should be factored into the nature and extent of information provided to these groups.

Overall respondent responses also indicate a very high level of satisfaction with the logistics of the mediation process. However three issues were identified in comments as requiring some further attention. These were mediation locations (which sometimes required lengthy commutes); lack of comfortable or adequate rooms for the mediation itself; and a lack of technical resources such as access to computer, fax etc.

### Outcomes of Mediation

A combination of questionnaire and PSSRB database data regarding outcomes of mediation suggests that mediation during the evaluation period was an efficient mechanism to achieve settlement in a respectable proportion of cases. An overall settlement rate of more than 50% is comparable with other opt-out mediation programs which may be time limited.

There is very strong data to suggest that mediation is being used effectively to generate outcomes either not available via, or seen as not appropriate for, adjudication. These outcomes relate to the development of practical workplace solutions which may lay the foundation for better working relationships. However, there are also concerns from grievors regarding follow-through with such voluntary arrangements.

The difference in perceptions between grievors and employers regarding the nature and substance of conflict must be understood in light of the power dynamics of the employment relationship. Grievors are more likely than employers to see outstanding, unresolved issues following mediation and a small number express a concern about going back into a workplace without a formal change in their circumstances. Nonetheless, grievors also appear to be more positive about the benefits of direct negotiation with the employer even where settlement is not reached

(or is, in their view, only "partial"). Close to half of both employers and grievors stated that they believed that their relationship was better as a result of mediation.

**The Mediation Process**

Participants expressed strong satisfaction with the overall fairness of the PSSRB mediations. The mediators received an excellent overall approval rating for their effectiveness and are highly rated for understanding the parties perspectives, promoting communication and assisting parties to find common ground. Parties feel that they have a voice in the mediation and are being heard and understood by the mediator. This latter point is important as it is a strong indicator that participants' procedural justice needs are being met.

Grievor representatives, who have the most experience with mediation of any respondent group, give the highest approval ranking in all areas. Other groups are more balanced between the highest and second highest rankings. There are very few respondents selecting negative rankings. Participant satisfaction remains high even when no settlement was reached.

Narrative comments collected via the written questionnaires or in focus groups contain many constructive points. Two of the most significant relate to the possible over-use of private caucus meetings and a tendency for some mediators to adopt an evaluative style by giving legal opinions. Finding the appropriate and effective balance between a mediator's use of subject matter expertise (desired by some program participants) and creating perceptions of bias by providing a legal opinion (complained of by others) is a need that should be addressed in future training.

Finally, the length of mediation sessions is satisfactory, and most parties are satisfied with the current system whereby the mediator is assigned rather than chosen by the parties.

**Future**

A significant number of respondents stated that their experience in mediation would make a difference to how they handled a future dispute. Grievor representatives were the least likely to indicate that they would change their practice and behaviours in the future, while employers were the most likely to state that they would make changes. Respondents providing comments can be broken down into three broad categories. The most prevalent comments are from those who found the mediation experience very positive. These respondents reported that they would recommend mediation to others and that they would look for earlier opportunities to mediate. A second category of respondents noted how they personally would improve their effective participation in mediation by being better prepared, behaving in a less confrontational manner another time, making sure that appropriate persons with authority to settle were present, and coming in with "an-open mind". Finally a smaller number of comments were made by persons who considered the mediation a waste of time, an unnecessary additional expense, and who would not be willing to mediate again at the PSSRB.

A large majority of respondents stated that they would use the pilot mediation at the PSSRB

again. Support for this view is strongest among grievor representatives and most mixed among employers.

**Recommendations**

1. The PSSRB should create a permanent mediation step in the procedure for the presentation of grievances under the *Public Service Staff Relations Act*.

2. Pre-mediation information should be provided directly to the parties as well as to their representatives.

3. The PSSRB should find a means of augmenting education and training for participants in the grievance process.

4. The PSSRB's protocol for mediation should include a pre-mediation conference stage at which the mediator contacts the parties individually to review the mediation process and any preliminary issues.

5. The PSSRB should ensure that adequate rooms, including private caucus meeting rooms, for all parties.

6. The PSSRB should pursue ongoing and advanced mediation training for new and experienced mediators, stressing the importance of a facilitative approach to mediation.

7. The PSSRB's protocol for mediation should include a standard mediation agreement.

8. Where appropriate settlement agreements should include provisions which describe necessary steps required to carry out the settlement terms and establish time lines for compliance.

9. The PSSRB should provide information to the parties regarding enforcement procedures.

10. The PSSRB should continue to monitor the effectiveness of the mediation process.

**Evaluators**

**DR JULIE MACFARLANE, BA, LLM,** Associate Professor, Faculty of Law, University of Windsor. Julie Macfarlane has researched and published widely in the area of dispute resolution. She is an experienced evaluator and has conducted numerous program evaluations of educational programs.(including programs at the University of Chicago, Northwestern University, University of Cardiff, University of Sussex, University of Warwick and City University of Hong Kong). In 1994 she completed a feasibility project for the Ontario Ministry of Housing on ADR for landlord/tenant disputes which has been used in the development of new legislated procedures for landlord and tenant disputes. In 1995 she was appointed by the Ministry of the AG to evaluate the first court-connected mandatory mediation pilot program in Toronto. This evaluation was used in the subsequent Civil Justice Review and informed decisions regarding future court-connected mediation programs in Ontario. She is currently the External Evaluator for the Conflict Management in Higher Education Resource Center at Wayne State University, and along with Ellen Zweibel and John Manwaring, is completing an evaluation of the Canadian Human Rights Tribunal Mediation Program.

**JOHN A. MANWARING, BA, LL.B, LL.M**. Associate Professor, University of Ottawa, Faculty of Law. John Manwaring's research and teaching areas include Labour Law, Contract Law, Philosophy of Law, and ADR. Together with evaluation team member, Ellen Zweibel, he designed the common law section's intensive program in conflict resolution for first year law students and directs this program for the French common law program. He has trained in mediation and designing dispute resolution systems at CDR in Boulder Colorado and the Canadian International Institute of Applied Negotiation. Professor Manwaring is the fully bilingual member of the evaluation team. He served as Vice-Dean of the French common law program for several years and teaches and writes in both French and English.

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**Final Report**

## PART ONE: Evaluation Methodology

### 1. Objectives

In March 1999, the PSSRB appointed us to evaluate the pilot grievance mediation program. Mediation would be offered in every case filed with the Board commencing on September 30th 1999. Some mediation of cases had already taken place on an *ad hoc* basis, but the Board now wanted to develop and evaluate a more systematic approach to encouraging early settlement via mediation. Mediations would be conducted by Board adjudicators who were being offered mediation training.

An initial meeting between the evaluation team and the Board's Evaluation Committee identified the following as objectives (and indices of each) for the grievance mediation program.

A. Enhancing the credibility of the grievance mediation program including:

- i. Promoting the participation of all stakeholders;
- ii. Increasing participant satisfaction with the grievance outcome by placing responsibility on the parties to find a workable solution;
- iii. Increasing the likelihood of employees and employers to use informal dispute resolution processes in the future;
- iv. Establishing confidence in the fairness of the process

B. Achieving time and cost efficiencies, including;

- i. Reducing the number of cases that require full adjudication;
- ii. Reducing the overall time required to resolve a dispute;
- iii. Achieving earlier settlements;
- iv. Reducing costs associated with full adjudications including board member decision writing time, decision translation and printing costs, travel costs and other incidental hearing costs

C. Improving the conflict resolution climate in the workplace, including:

- i Improving the relationship between bargaining agents and employers by using co-operative processes to develop satisfactory consensual solutions;
- ii. Enhancing the dispute resolution skills of all participants;
- iii. Impacting broadly on the workplace dispute environment through the restoration of harmonious working relationships between parties who continue in the same workplace;

D. Enhancing the effectiveness of the mediators, including:

i. Identifying the overall strengths and weakness of the mediators;
ii. Identifying future training needs

Evaluation of the pilot program was to be based on how far these objectives were achieved during the first 12 months of the mediation pilot program, that is, October 1st 1999 - September 30th 2000 (hereinafter "the evaluation period"). While these objectives provided the basis on which the evaluation methods were chosen and appropriate instruments developed, it was clear from the outset that this evaluation would produce only limited data on costs savings (since it was not a cost/benefit analysis) and only incidentally on individual mediators (performance assessment of individual mediators was not a part of the evaluation mandate). Similarly measurement of the impact of the pilot project on the workplace dispute resolution climate would be limited to ascertaining party perceptions shortly after the mediation sessions as the evaluation was not a longitudinal study of attitudinal changes. This dimension of the impact of mediation might usefully be the subject of a future study.

## 2. Methodological Approach

Assessing the impact of the program, and its success in achieving its stated objectives, required the use of qualitative as well as quantitative methods of data collection and analysis. Some objectives for the pilot program could be evaluated via the collection and analysis of quantitative data. Generally, the objective of collecting quantitative data for evaluation purposes is to provide a full case management picture; for example, the volume of cases which settled using mediation, those which continued to adjudication, and the timing of settlement. In this evaluation we wished to answer the following questions:

a) How many cases were resolved via mediation at the PSSRB in the period September 30 1999 - September 29 2000? (Outcome data)

b) What were the time lines for those cases that resolved using mediation at the PSSRB between September 30 1999 - September 29 2000? How did this compare with the time lines for those cases that settled without mediation? And those that went forward to a hearing (or still await a hearing) during this period?[1](Time lines data)

c) Do there appear to be any other, unanticipated variables that are significant to settlement and time lines?

However quantitative data often raises more questions than it answers. An evaluation of the success and efficacy of a new process - and in particular, how satisfied users are with the program - requires other tools for data collection and analysis. Qualitative methods (such as focus groups and open-ended survey questions) are particularly appropriate. These methods can focus intensely on the detail of cases in order to identify and establish any significant patterns[2]. Qualitative data is also essential in order to understand the unique internal dynamics of a program and in order to fully differentiate the views and attitudes of different user groups (here,

employers and their representatives, grievor employees and their representatives).

Qualitative data collection was directed towards answering the following questions:

1. How satisfied were the various user groups with the grievance mediation process and the outcomes that it produced? In particular, did they see the process as constructive, legitimate and fair? Were there any evident differences in the perceptions and reactions of the various user groups, and how might these be explained?

2. How useful and significant did the user groups perceive their mediation experience to be for the future of this particular employer/employee relationship?

3. How useful and significant did the user groups perceive their mediation experience to be for the future management of other (potentially conflictual) relationships and situations in the workplace?

4. Generally, what was the level of knowledge and understanding about the mediation process and how might this be enhanced?

5. How did the user groups appraise the role played by the mediator? Did any consensus emerge regarding preferred mediator style, or did different user groups demonstrate different preferences?

6. Any other significant problems identified by users.

The effect of combining quantitative and qualitative evaluation methods is to enhance the depth, breadth and hence the reliability of the final results of the evaluation[3]. In effect this approach (often described as methodological triangulation[4]) acts as a `double-check' on information and results. Qualitative data can be reinforced and expanded by quantitative data which also provides it with a broader context and framework for analysis. On the other hand, qualitative data can be used to develop explanations for any patterns emerging from the quantitative data. Combining quantitative and qualitative approaches enables comprehensive and wide-ranging information to be provided to decision-makers on the future of the pilot grievance mediation program[5].

Another aspect of triangulation is the combination of data from different sources in order to enhance the reliability of findings. Throughout the evaluation, data was collected from six distinct groups: PSSRB management (the "Evaluation Committee"); PSSRB Board members who acted as mediators; and four user groups comprising employers, employers representatives, grievors and grievor representatives (usually union representatives). Data from each of these groups is differentiated and compared throughout this Report. There were some practical limitations on the types of data that were accessible to us, and these are explained below. Generally, however, this combination of alternate sources of data and methodologies for data collection has produced a comprehensive picture of the operation of the pilot program.

## 3. Data Collection Methods

In order to obtain both quantitative and qualitative data, the following data collection methods were used:

### a) Focus Groups

Focus groups comprise invited individuals who agreed to participate in a discussion on a particular topic. They can be very effective for tracking opinions within any respondent group, identifying the strongest views held (since participants self-select, they often hold strong views), and facilitating exchange of opinions and experiences among participants. What focus groups offer that is different from personal interviews is a group environment for discussion and a less costly and time-consuming means of obtaining input from a number of persons at one time (up to 12). However, because of the group environment, unlike personal interviews, focus groups may fail to clarify underlying individual issues and tend to be driven by the most vocal participants. To address this, it is important to structure focus group questions in advance to ensure that facilitators can direct the discussion to anticipated issues. Some final time can be built in for other issues to be raised by participants[6].

Focus groups do not provide significant quantitative data, due to the small numbers of individuals involved. However, they do offer a useful environment for probing questions raised by numeric data and by raw questionnaire data.

We conducted focus groups at three stages in this evaluation:

i) Before commencing evaluation of the pilot in September 1999, focus groups were held in Ottawa in April and May 1999 with employers and their representatives, and union representatives. A total of 14 individuals participated. Each group was presented with the objectives identified by the Board (above) for the pilot grievance mediation program. The purpose was to (a) communicate to users the objectives held by the Board and (b) identify any differences in objectives or expectations between the Board and various user groups.

Information from these focus groups was used to inform our development of the questionnaire survey instrument (see below).

ii) A focus group was held with PSSRB mediators on December 1999, which explored their initial experience with the grievance mediation pilot, individual mediation techniques and their future training needs.

iii) Half-way through the evaluation period, focus groups were held in Ottawa in June 2000 with employers and their representatives, and employees and their representatives. This was 8 months into the pilot period. A total of 16 individuals participated. Focus group questions were devised following a preliminary analysis of questionnaire survey data (below), provided to the Board in our Interim Report of May, 2000. Each group was asked about procedural and logistical matters relating to the mediation program (venue,

length of sessions, scheduling etc); their experiences of the mediation process itself and the mediators; and their opinions of the outcomes produced by mediation. The schedule of questions developed for the focus groups is provided at Appendix A.

Information from these focus groups was used to supplement, and where appropriate expand, data produced from questionnaire surveys. It is included below at Parts 2 ("Logistics"), 3 ("Outcomes"), and Part 4 ("Process").

b) **Questionnaire**

The core questionnaire was developed using prototypes from a number of other program evaluations of court-based and institutional mediation services (for example, the work of Professors McEwen and Mainman on small claims court mediation in Maine[7]; the work of Professor John Barkai on court-based arbitration in Hawaii[8]; the work of Professor Joseph Tomain in evaluating the Ohio Center for Dispute Resolution[9]; and the work of Professor Julie Macfarlane in evaluating the Ontario General Division ADR pilot). The core questionnaire was reviewed by the PSSRB Evaluation Committee and pretested for an initial period through an additional open-ended question which asked for comments on the questions themselves. Some adjustments were made to the core questionnaire based on pre-testing comments. The questionnaire was then translated into French at the Board and reviewed by John Manwaring.

There were two final versions of the core questionnaire, one for the parties and their representatives and one for PSSRB mediators. The mediator questionnaire was a shorter version of the party participant questionnaire focussing specifically on outcomes, their impression of party satisfaction and self-identification of the mediator interventions they used.

The questionnaire survey instruments are provided at Appendix B.

In approaching the design of questionnaires, we combined our concern for ease of response and analysis with space for "open-ended" responses in order to capture unanticipated issues and responses. To ensure a reasonable response rate, pre-set categories of answer were used in many places to gauge a range of responses. In addition some spaces were left open for further comment (for example, "please describe", "any further comments" etc). In this way questionnaire data provided not only numeric data, but also more anecdotal and in-depth insight into the operation of the program. The focus of the questionnaire was on the parties' reactions to involvement in a new and unfamiliar or only marginally familiar process, in terms of their satisfaction with both the process[10] and the outcome[11] of mediation; and their experience with the logistics of the program.

Responses to closed category questions are presented in this Report as frequencies, broken down by user group. In addition, a chi square analysis was run on most sets of frequencies to measure probability. Although in some cases the numbers were too small (especially where each user group was measured separately) to produce a statistically significant outcome, the frequencies nonetheless provide valid and authentic data in relation to our sample group. In addition, some chi square analysis was run on combinations of particular questions, to see if any statistically

significant correlations were produced. These results also are reported below. Again, we would emphasise that some interesting and potentially useful observations can also be made by simple correlations in the absence of statistically validated probabilities (where $p =< .05$) Responses to open-ended questions and written responses added to the end of closed category questions have been used to clarify and draw out some of these observations on frequencies, correlations and other patterns emerging from an analysis of questionnaire returns.

The questionnaire was given to all employer parties (including their representatives) and grievor parties (including their representatives) who attended at mediation at the PSSRB during the pilot period, at the conclusion of their mediation session. Questionnaires were also given to the PSSRB mediators, who were asked to complete one for each mediation they conducted. Each questionnaire asked respondents to identify the case by its PSSRB case file number. Where the representative had participated in more than one mediation with the PSSRB she/he was asked to complete a questionnaire in relation to each mediation attended. All participants were provided with pre-addressed envelopes to mail the completed questionnaire directly to the evaluation team. Upon receipt, each completed questionnaire was assigned a form number.

291 completed questionnaires were returned. Case file data recorded by the PSSRB itself (see below) tells us that mediation was agreed to in 388 cases throughout the pilot period, although some of these were multiple grievances resulting in a single mediation. While each questionnaire is an individual participant's report on one mediation session, that session may involve more than one matter and may include either one or several grievors, as indicated by the multiple case file numbers reported on many of the questionnaires. The PSSRB's own records report that 119 mediations were held during the pilot period. From tracking the file numbers, it appears that the 291 completed questionnaires received report on at least 67 separate mediation sessions. This suggests a case-factored respondent response rate (based on 119 cases) of 56%. These are excellent return rates. This has enabled the development of a very comprehensive picture of what parties to mediation during the pilot period were thinking and feeling about their participation in the process.

The breakdown of completed questionnaires by respondent grouping is as follows:

**TABLE 1: Questionnaire Response Rate by Respondent Group**

| User group | Raw number | % of total returns |
|---|---|---|
| Employers | 14 | 5% |
| Employer representatives * | 78 | 27% |
| Employer lawyers | 4 | 1% |
| *Total employer side* | *96* | *33%* |
| Grievors | 61 | 21% |
| Grievor representatives * | 54 | 19% |
| Grievor lawyers | 4 | 1% |
| *Total grievor side* | *119* | *41%* |
| Mediators | 68 | 23% |
| Party status not specified by respondent | 9 | 3% |
| **Grand total** | **291** | **100%** |

* not specified to be lawyers

Clearly very few lawyers responded to the questionnaire. The same low number appeared in the data we reported on in the Interim Report (May 2000). The mediators' reports, and subsequent focus group discussions, confirm that those attending as representatives are seldom lawyers and are more commonly other types of representatives; for example a union representative for the grievor or a delegated decision-maker on behalf of the employer. Therefore, for the purpose of the quantitative analysis of questionnaire responses, grievor and employer lawyers (n=8) and questionnaires where party status was not specified (n=9) have been excluded so that calculation of frequencies is based on 275 completed questionnaires.

The 207 individuals - excluding the mediators themselves - who completed questionnaires had varying degrees of experience with the mediation process. The largest discrepancy came between the level of reported experience by grievor representatives, almost three quarters of whom reported that this was not their first experience of mediation, and that of grievors, of whom only 13% had any previous experience of a mediation in any context (compared with employer representatives, less than half of whom stated that they had had previous experience of a mediation.) Of those in each group who reported previous mediation experience, around half in each case said that they had mediated previously at the PSSRB. The possibility that grievor representatives are more likely to be experienced "repeat players" at mediation, and especially at the PSSRB is strengthened by the fact that a single bargaining unit (PSAC) was responsible for bringing 79% of claims over the evaluation period (see also below, at iii). Grievors and employers who completed questionnaires, as might be expected, had generally much lower levels of experience with mediation both in general and at the PSSRB than their representatives. In this

sample, employers were slightly more likely to have been through mediation before (21%) than grievors (13%).

**TABLE 2: Questionnaire Response by Previous Experience of Mediation**

| Table No: 2 | | First Experience | Previous Experience |
|---|---|---|---|
| User Group | No. / Valid No. | No. / Percent | No. / Percent |
| All | 207 / 206 | 117 / 56% | 89 / 44% |
| Grievor | 61 / 61 | 53 / 87% | 8 / 13% |
| Grievor Rep | 54 / 54 | 14 / 26% | 40 / 74% |
| Employer | 14 / 14 | 11 / 79% | 3 / 21% |
| Employer Rep | 78 / 77 | 39 / 51% | 38 / 49% |

**TABLE 3: Questionnaire Response by Previous Experience of Mediation at the PSSRB**

| Table No: 3 | | PSSRB Mediation Experience | Other Mediation Experience |
|---|---|---|---|
| User Group | No. / Valid No. | No. / Percent | No. / Percent |
| All | 89 / 59 | 28 / 47% | 31 / 53% |
| Grievor | 8 / 8 | 3 / 38% | 5 / 62% |
| Grievor Rep | 40 / 20 | 11 / 55% | 9 / 45% |
| Employer | 3 / 2 | 0 / 0% | 2 / 100% |
| Employer Rep | 38 / 29 | 14 / 48% | 15 / 52% |

Finally, it is difficult to determine the representativeness of the sample that responded to the questionnaire in terms of either case type or party type. This data was not available to us from the larger PSSRB database (see below).

**c) PSSRB Database Analysis**

The third data collection method employed involved an analysis of information kept by the PSSRB on their own internal database of all cases referred to the Board. The parameters of this analysis have been set out above. We had hoped to also analyse the database to determine the

impact, if any, of potentially significant variables such as case type and party type[12]. Unfortunately, this data was not available to us in electronic format suitable for analysis (although some manual tracking was done of the two major system users, PSAC and PIPSC).

Whereas the two other data collection methods used - focus groups and the questionnaire survey - relied on a sampling of the experimental group only, in order to draw more interesting and useful conclusions from the results of the database analysis we wished to compare it with a control or comparison group[13]. We had initially hoped to be able to draw a matched sample from an earlier (but fairly recent) 12 month reporting period at the PSSRB during which mediation had been little used. In fact, on examination of the data for the 12 months immediately preceding the pilot stage (ie October 1st 1998 - September 30th 1999), we found that mediation was used frequently during this time, as indeed it had been for some years at the Board. However, we had little information about the form and structure in which it was offered (indeed, there was little monitoring done during this development period). This made it difficult to control for important variables (such as the style of mediation, the length of sessions, the objectives of mediation etc) in developing the control group and analysing its results side-by-side with those from the evaluation period.

As a consequence, we decided that it was preferable to use a control group of cases which fell within the evaluation period, but which did not agree to mediation. This would enable us to compare like with like; within the evaluation period, **all** cases had been offered mediation within a particular methodological and philosophical framework of which both users, and evaluators. had formal notice. Our control group thus became the 515 cases which refused mediation during the evaluation period, and our experimental group the 388 cases which agreed to mediation during this period.

The disadvantage of using this group as a control, however, is that many of the control group cases had not been completed, or indeed been the object of any action either by the end of the evaluation period or by December 18, 2000 the date on which the data was provided (similar methodological problems have been reported by previous grievance mediation program evaluations[14]). Since these cases have refused mediation, it is possible that settlement discussions will take place closer to the date of the hearing, which for some cases in this group had not taken place by the end of the evaluation period.

While it would have been desirable to draw a control group "matched" (in terms of primary potential variables such as case type and party type) to the experimental group, we were not able to do this because of the limited information available on case type and party type (see above). We were able, however, to eliminate one potential variable that might have skewed results. By tracking the major system user, the bargaining agent PSAC, we were able to verify that the identity of this user, at least, did not apparently significantly affect results. Outcomes were highly consistent between PSAC and non-PSAC cases. Of the total number of cases filed during the evaluation period, 43% agreed to mediation - exactly the same percentage of PSAC cases agreed to mediation. Of PSAC cases that went to mediation, the 51.5% settlement rate was almost identical to the 52% of the total cases in the experimental group that settled. A similar analysis was carried out tracking the cases filed by the second major system user, PIPSC. Once again

there was reasonable consistency in both the use made of mediation (a slightly lower percentage, 36%, of PIPSC cases agreed to mediation) and the settlement rate in mediation (61.5%, slightly higher).

Numeric data on volumes and time lines for both the experimental group and the control group was collected from the Board's own database and analysed (manually) to provide information on settlement rates and length of time to settlement. We have also noted the impact of multiple grievances - on the same issue, filed on the same day and settled on the same day - on these figures.

The results of this component of the evaluation, and our analysis of those findings, are provided in parts 2 ("Logistics") and 3 ("Outcomes") of this Report.

### 4. Non-Controlled Variables

In any program evaluation, there are likely to be variables which may affect the impact of the program which are not or cannot be accounted for within the scope of the evaluation methodology. For example, a new program may be subject to budgetary or resourcing restrictions that limit program implementation; or a primary client group may be unable to access the program as intended; or the program's impact may be affected by parallel initiatives that were unanticipated by the program designers. In this particular evaluation, while there were no unanticipated changes that affected program planning, we were aware as we collected evaluation data from all respondent groups that the labour relations context - the established culture of labour/ management relationships, and the types of conflict type and dispute resolution style that this has conventionally produced - was an ever-present variable within the study. For example, some of the perceptions of employees and employers about their satisfaction with the mediation process as an alternative to adjudication might be explained by placing those perceptions within the framework of labour/ management relations. Further, multiple grievances against the same employer filed on the same day, are often symptomatic of underlying issues in the employer-union relationship. Sometimes, for example, multiple grievances are filed as a strategic manouevre in preparation for the negotiation of a new collective agreement or in order to pressure the employer to agree to the amendment of an existing collective agreement. Strategic behaviour in the context of an on-going collective bargaining relationship may mean that grievances are not simply individual employee/employer disputes. We did not have access to any data which would enable us to understand the grievances within their labour relations context in spite of the obvious signification of these variables for both withdrawal decisions and settlements reached either prior to, or during, mediation.

There were several other possible variables that the evaluation methodology did not control for and which may, or may not, have affected the results reported below. One is the concentration of claims from two major users - PSAC and PIPSC - which, while it does not appear to have affected the pattern of agreements to mediate or settlement outcomes, may mean that there is a staff of experienced mediation representatives working for these two bargaining agents whose orientation towards the mediation process will have a significant impact on the future of the program. Second, 27% of grievances filed during the pilot period were brought against a single

employer (CSC) and these cases may reflect a particular workplace context, and set of desired outcomes, which are quite independent of the PSSRB mediation pilot. The *Public Service Staff Relations Act* allows for both individual (ss. 93(1) and bargaining agent (s. 99) grievances. We were unable to take into account variables such as the nature of the grievance (individual or bargaining agent) and cannot determine the impact of the multiple strategic motivations that exist for using the grievance process at the PSSRB.

**PART TWO: Information and Logistics**

The responses to Q. 3 (sufficiency of information) and Q. 4 (logistics) indicate that the overall assessment of the process is very positive. Eighty-one percent of all respondents indicated that they had sufficient information prior to mediation. Eighty-two percent indicated that they were satisfied with the logistics. These numbers support the conclusion that there is a very high level of satisfaction with the presentation and organization of the mediation process. The comments point to ways in which these two aspects of the mediation process can be improved.

**TABLE 4: Did you have enough information about the purpose of this mediation session and how it would proceed in advance of the session? (Q3)**

| **Table No: 4 Question 3** | | **Yes** | **No** |
|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent |
| All | 207 / 204 | 166 / 81% | 38 / 19% |
| Grievor | 61 / 61 | 42 / 69% | 19/ 31% |
| Grievor Rep | 54 / 53 | 46 / 87% | 7 / 13% |
| Employer | 14 / 14 | 13/ 93% | 1 / 7% |
| Employer Rep | 78 / 76 | 65 / 86% | 11/ 14% |

**TABLE 5: Were you satisfied with the logistical arrangements for the mediation? (Q4)**

| Table No: 5<br>Question 4 | | Yes | No |
|---|---|---|---|
| | No. /<br>Valid No. | No. /<br>Percent | No. /<br>Percent |
| All | 207 / 205 | 169 / 82% | 36 / 18% |
| Grievor | 61 / 61 | 46 / 75% | 15 / 25% |
| Grievor Rep | 54 / 54 | 49 / 91% | 5 / 9% |
| Employer | 14 / 14 | 10 / 71% | 4 / 29% |
| Employer Rep | 78 / 76 | 64 / 84% | 12 / 16% |

1. **Information**

The grievor representatives, employers and employer representatives were relatively uniform in reporting that they had sufficient information prior to the mediation. (86%-93% chose "Yes" in Q3.) The only group which was less enthusiastic in agreeing that it had sufficient information was the grievor. Only 69% of grievor respondents answered that they had sufficient information prior to the mediation. The comments suggest that all categories of participants would have appreciated more information earlier in the process.

The comments of the different participants on the shortcomings or lack of information provided focus on different types of information concerning the mediation process. The different focus may derive from the relative degree of experience with the process. For example, there are relatively few union representatives involved in representation of grievors before the PSSRB and, therefore, they are very likely to be repeat users of the system and have a high degree of familiarity with the process. Very few grievor representatives commented on lack of information about the mediation process as such; they would like more specific information on the actual mediation such as who would be attending so that they could better prepare.

In contrast, employers, employer representatives and grievors want basic information on the mediation process itself . None of these participants is likely to have the same level of repeat participation in the process as the grievor representative. Employer representatives are less likely to specialize in grievance dispute resolution given the size of the Public Service. This factor which decreases familiarity with the process is offset somewhat by the availability of training in dispute resolution techniques in the Public Service. The usefulness of information sessions and training was commented on by employer representatives in the focus groups held prior to the start of the Pilot Project. The comments suggest that employer representatives and employers would have appreciated answers to questions such as: What is the scope of a mediation?; Who will participate and what will their role be?; and What are the basic rules of mediation? These questions all reflect their relative lack of experience. It should be noted that employers may rely

on their employer representative for information about the process and may be expressing frustration at the communication within their own department or sector. One employer representative commented: "I received information pertaining to adjudication, not mediation. My staff relations officer did not respond to repeated requests for information. I did not know the impact of mediation until the session occurred."

Grievors are the least likely to have repeat experience of the mediation process. They tend to criticize most strongly the lack of information prior to the actual mediation. Several stated that they had very little idea of what to expect. They would have appreciated receiving information such as a pamphlet or a "written explanation of the process" well before the date of the mediation. Receiving information on the day before or the day of the mediation is not satisfactory. Some of this dissatisfaction may reflect the fact that the grievor has to rely on his or her union representative for information. If the latter is very busy, the information may not reach the grievor until shortly before the mediation. Another factor may be distance when the grievance relates to a bargaining unit in one of the regions. If the grievor representative must travel from Ottawa or another urban center, there may be little contact prior to the mediation. One grievor commented that he or she was unsure what would occur until he or she read a pamphlet that was sent to management. Several commented that the information provided by the mediator at the outset of the mediation would have been helpful if provided in advance.

2. **Logistics**

The overall response to Q. 4 concerning logistics indicates a very high level of satisfaction with the logistics of the mediation process. Eighty-two percent of all respondents indicated that they were satisfied. The grievor representations were the most satisfied (91%) followed by employer representatives (84%) The satisfaction level dropped to 75% for grievors and to 71% for employers.

Three basic themes emerge from the questionnaire comments: the location of the mediation was unsatisfactory, the rooms available for the mediation were unsatisfactory and the available technical resources were inadequate.

a) **Location**

Several respondents from both the employer and bargaining agent groups indicated in their comments that the location chosen for the mediation was unsatisfactory. They were required to travel to locations that were far from their homes and workplace. One grievor representative said that the nine grievors and local representatives had a total commute of four hours. Several stressed the importance of proximity to the workplace. One grievor suggested that the mediation should be held during the grievor's work hours. Several stressed the difficulties they had in finding parking and commented on the cost of parking.

b) **Rooms**

One grievor representative and several employer and employer representatives indicated that the rooms provided were inadequate. There were no break-out rooms provided and the parties had to use either public spaces or private hotel rooms for caucuses. One grievor representative suggested that the cost of these rooms could be shared by the parties.

Four respondents commented that management and the bargaining agent/employee should not be on opposite sides of the table. One grievor commented that the room was small and badly ventilated. An employer representative suggested that juice and coffee should be provided.

c) **Technical Support**

Respondents from both the employer and employee groups indicated that they would have appreciated access to telephone (preferably in a private room), fax, photocopier and computer services.

Other comments suggest that the parties would like earlier notification of time and place as well as the name of the mediator. One grievor representative commented that notification was sent only to the grievor. Comments relating to the information provided confirm the discussion of the responses to Q3 which indicate that participants would like to have more complete information earlier in the process. One employer commented that there appeared to be little centralized co-ordination and that it would have been easy not to be present.

One employer representative commented that there could have been more meetings directly with the employees which would have avoided "down time". This appears to be a reference to the use of caucus.

One grievor representative commented that the rules of confidentiality are not clearly established and that certain documents provided on the assumption of confidentiality were given to the other party.

One grievor raised the issue of being in the same room with a manager against whom she/he had filed a harassment grievance. The grievor was afraid and intimidated. She/he learned that the manager would be attending three days before the mediation and spent a very stressful week-end. However, she/he indicated that the mediator "was exceptionally insightful and efficient and broke us up quickly."

## PART THREE: Outcomes

### 1. Mediation Outcomes

Since the 275 questionnaires represent individual participants not single cases, one would expect some discrepancy in the reporting of the outcomes between respondent groups. The highest settlement rate reported by a respondent group is from the mediators, whose questionnaire returns stated that full settlement was achieved in 81% of cases. This can be compared with the data extracted from the PSSRB database during the evaluation period, which shows a settlement rate of 52% for cases that agreed to mediation (43% of the total filings in the pilot period or n = 388). The difference here may be explained by the fact that there may be a tendency for those (from any respondent group) whose mediation was successful to be more willing to complete and return questionnaires. It is also important to note that the PSSRB database does not record whether or not a case in which the parties agreed to mediation actually went to mediation, nor does it distinguish between cases that settle because of mediation, or because of another event. This figure of 52% must be read in that light ie it refers to those cases filled during the evaluation period in which the parties agreed to mediation, and which subsequently settled - whether as a result of mediation, or not.

This settlement rate of 52% for the experimental group can be compared with the settlement rate for cases that did not agree to mediation (the control group). The settlement rate for the control group is 25.2% (n = 130), or 14.4% of total filings during the evaluation period. In other words, where the parties refused mediation, settlement - presumably as a result of negotiations between the parties or their representatives - occurred in approximately one quarter of the cases.

The outcomes of mediation were recorded as follows by questionnaire respondents.

**TABLE 6: Did the mediation session result in ... ? (Outcomes of mediation by respondent group - Q5)**

| Table No: 6 Question 5 | | Full Agreement | Partial Agreement | No Agreement | No Agreement Plan to Meet Again |
|---|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent | No./ Percent |
| All | 275 / 272 | 200 / 73% | 36 / 13% | 32 / 12% | 4 / 2% |
| Grievor | 61 / 61 | 39 / 64% | 15 / 25% | 6 / 10% | 1 / 2% |
| Grievor Rep | 54 / 52 | 36 / 69% | 11 / 21% | 5 / 10% | 0 / 0% |
| Employer | 14 / 14 | 9 / 64% | 2 / 14% | 2 / 14% | 1 / 7% |
| Employer Rep | 78 / 78 | 62 / 79% | 3 / 4% | 11 / 14% | 2 / 3% |
| Mediator | 68 / 67 | 54 / 81% | 5 / 7% | 8 / 12% | 0 / 0% |

Note that the questionnaire, in contrast to the PSSRB database, includes an additional category for respondents to mark the outcome of their mediation as "partial settlement". It is here that the differing perceptions of the different respondent or user groups regarding outcomes of mediation are most interesting. While only 5% of mediators, and just 4% of employer representatives considered the mediation they participated in to have resulted in "partial settlement : some issues still outstanding", many more grievors (25%) and their representatives (21%) saw outstanding issues; and this despite, perhaps, a memorandum of formal settlement. The response from employers in this category (n = 2) is too small to be noteworthy. However, it is clear both from these frequencies and from comments that there are differing perceptions of what constitutes "full" as opposed to "partial" settlement between grievors and the employers side generally; indeed, the difference between the two sides taken together is statistically significant ($p = .0008$). The data suggest that grievors are more likely to see outstanding issues (even, perhaps, when the substantive legal points have been settled) than either employers or mediators.

Some sense of what these outstanding issues might be, emerged from the focus groups with grievors and their representatives. There seems to sometimes be a sense that the relationship between the grievor and the employer may continue to "...fester, like a scab they keep picking at". One grievor representative commented that there was more of a feeling of closure about adjudication than was achieved via a mediated outcome. Many mediated outcomes - for example where relationship rebuilding is needed or where climate change is an issue - require goodwill and trust to work to their maximum potential. The difference between grievor and employer perceptions of "outstanding issues" would fit with the hypothesis (supported in other grievance

mediation studies, for example, the evaluation of the US Postal Service's REDRESS program[15]) that employees (as the claiming party) may come to mediation with higher expectations regarding outcome than employers. The "loose ends" or continuing relationship or climate issues that grievors identify as "outstanding issues" may never have been issues for their employers.

We had hoped to be able to show how long cases which went through mediation took to reach settlement (where the matter was resolved at mediation), and compare this with timelines for cases that settled or withdrew without resorting to mediation, or proceeded to adjudication. However, we were unable to access data to reveal this. The data that we were provided with did not distinguish between cases that settled in mediation and those that settled without using mediation (see above). In addition, many of the cases filed during the evaluation period which did not settle or withdraw had not yet reached a hearing by the end of the evaluation period.

It is important for the Board to be able to verify that mediation is not causing delay or slowdowns in timelines to resolution.

## 2. Other Results of Mediation

Respondent groups varied considerably in their views on the usefulness of the mediation process in narrowing the issues in dispute, where mediation did not result in a settlement.

**TABLE 7: If the mediation did not result in either full or partial agreement, did it narrow the issues? (Q6)**

| Table No:7 Question 6 | | Yes | No |
|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent |
| All | 72 / 57 | 32 / 56% | 25 / 44% |
| Grievor | 22 / 17 | 9 / 53% | 8 / 47% |
| Grievor Rep | 16 / 11 | 8 / 73% | 3 / 27% |
| Employer | 5 / 3 | 1/ 33% | 2 / 67% |
| Employer Rep | 16 / 14 | 9 / 64% | 5 / 36% |
| Mediator | 13 / 12 | 5 / 42% | 7 /58% |

It is noticeable that party representatives are more likely than their clients to state that the issues in disput have been narrowed, even where settlement has not been achieved (Q6). Seventy-three percent of grievor representatives and 64% of employer representatives (compared with 53% and 33% of their clients, respectively) stated that they thought that mediation had been successful in

narrowing the issues. Again, this may reflect a different understanding of both the nature of the problem itself, and what it means to "solve" it. Although the numbers are small, it would appear that employees are generally more content that time was nonetheless spent usefully, even in the event of an "unsuccessful" mediation session than employers (see also Table 10 giving the results for Q9 below). This may reflect the value employees may place on an opportunity to have a face-to-face discussion with the employer, which previous studies have suggested is distinctive from the value anticipated or placed on such an opportunity by the employer[16]. It may also reflect each group's opportunities for alternate processes that could produce similar clarification or information exchange; for employees, such opportunities may be far more limited than for employers. However, this is speculative since we have no data on this point.

**TABLE 8A: If the mediation did not result in either full or partial settlement, what would you identify as the three most significant reasons for the failure to fully resolve the dispute? (Q7)**

| Table 8A Question 7 | Mediator Ineffective | Other Party Lacked Good Faith | Facts Complex and in Dispute | Legal Issues Complex | Parties hostile towards one another |
|---|---|---|---|---|---|
| | No. / Percent | No. / Percent | No. / Percent | No./ Percent | No. / Percent |
| All (72) | 2 / 3% | 28 / 36% | 16 / 21% | 7 / 9% | 6 / 8% |
| Grievor | 2 / 9% | 9 / 41% | 5 / 23% | 3 / 14% | 2 / 9% |
| Grievor Rep | 0 / 0% | 4 / 25% | 5 / 31% | 1 / 6% | 1 / 6% |
| Employer | 0 / 0% | 1 / 20% | 0 / 0% | 0 / 0% | 0 / 0% |
| Employer Rep | 0 / 0% | 6 / 38% | 4 / 25% | 1 / 6% | 0 / 0% |
| Mediator | 0 / 0% | 7 / 54% | 2 / 15% | 2 / 15% | 3/ 23% |

**TABLE 8B: If the mediation did not result in either full or partial settlement, what would you identify as the three most significant reasons for the failure to fully resolve the dispute? (Q7))**

| Table 8B Question 7 | Representatives hostile towards one another | Unrealistic Expectations | Prior Internal ADR Process | Inadequate preparation for settlement discussion | Party/parties Not Credible |
|---|---|---|---|---|---|
| | No. / Percent | No. / Percent | No. / Percent | No./ Percent | No. / Percent |
| All (72) | 1 / 3% | 35 / 45% | 6 / 8% | 18/ 23% | 7 / 9% |
| Grievor | 0 / 0% | 7 / 32% | 3 / 14% | 4 / 18% | 2 / 9% |
| Grievor Rep | 0 / 0% | 3 / 19% | 1 / 6% | 3 / 19% | 2 / 13% |
| Employer | 0 / 0% | 3 / 60% | 0 / 0% | 2 / 40% | 0 / 0% |
| Employer Rep | 1 / 6% | 13/ 81% | 1 / 6% | 6 / 38% | 1 / 6% |
| Mediator | 0 / 0% | 8 / 62% | 1 / 8% | 2 / 15% | 2/ 15% |

Responses to Q7 - asking what were the most significant reasons for not settling the dispute - represent fairly small numbers in many cases (there were many options listed) which does not allow very strong conclusions to be drawn from some of these results - other than, perhaps, the diversity of perceptions over why cases do not resolve in mediation. However, it is noticeable that "unrealistic expectations" (presumably those of the other party) is by far the most commonly cited reason by employer representatives (81%). This is variously described in comments provided as grievor demands which are "not feasible", or "an unrealistic assessment of (the) situation which was unshakeable". It is noteworthy that the corresponding figure for grievor representatives is much lower (19%). For this group, the most significant impediments to settlement were the complexity of the factual issues (31%) and a lack of good faith (25%). For grievors, the most often cited reason was "lack of good faith" (41%). In written comments, several complained that a person with appropriate authority was not present on the employer's side. This may have been an oversight, but understandably is often regarded as a sign of bad faith by bargaining parties. Mediators identified "unrealistic expectations" (62%) and "lack of good faith" (54%) as the two most significant factors in failing to reach settlement. This corresponds with earlier work on mediators' perceptions of why cases do not settle[17].

There were very few responses which implicated the mediator in the failure to settle, suggesting a very high rate of satisfaction with the mediator (see below at Part Four for further details).

However, one or two written comments are significant in making very strong criticisms of the mediator. For example,

> "The mediator was confrontational and set the tone for the whole process which was very one-sided, I felt. I felt insulted and bullied by him. I would NEVER (respondent's capitals) attempt a mediation at the PSSRB again"

Question 8 asked whether there was any component to the mediated settlement that might not have been available via adjudication. Responses to Q8 initially suggested a very high proportion of cases (81% in the view of the mediators, 59% in the view of grievors' representatives and 49% in the view of employers' representatives) contained something not available as an adjudicative remedy. A noticeably larger proportion of employers (70%) than grievors (41%) also answered yes to this question. However the comments of grievors and employers suggest that there may be some misunderstanding of this question - some appear to confuse process - for example, "direct communication between complainant and respondent" - with outcomes or remedy. Nonetheless, there is strong data provided by all groups to suggest extra-adjudicative solutions including, for example, the development of a future workplace communications policy; agreeing the text of a revised job description; marketing an employee to another organisation or agency; agreeing to transfer an employee between departments; agreement to a job classification review; agreement for early retirement; and retroactivity as a component of a part of an agreement (for example an agreement to pay backpay). Several respondents described the opportunity to negotiate the general conditions of a better workplace climate that now better understood and responded to the grievors' concerns. For example, one mediator commented:

> "The employer undertook the facilitation of a more comfortable work environment for the grievor over the next 2.5 years, until his retirement on full pension"

In addition to these actual outcomes that could not have been included in an order following adjudication by the Board, a number of respondents mentioned that issues were resolved in mediation that would have formally fallen outside the jurisdiction of the Board. Several respondents described settlements in relation to disputed issues (for example, job classification) which they noted that the Board would not have had jurisdiction to hear and rule on had they reached a formal hearing. Interestingly, there was no questioning by employer side respondents that a voluntary negotiated agreement to address these non-justicable issues was anything other than a good outcome for all parties. In other words, mediation provided an appropriate and practical solution to a problem that might have otherwise gone unresolved.

These are very encouraging results as they support the hypothesis that practical solutions that would otherwise not be forthcoming are possible in the context of mediation. However, one important caveat emerges from focus group comments by grievors and employers. Several complained that compliance with an agreed outcome had been lacking or problematic. Full compliance with some of the more intangible outcomes - for example, employer commitments to improving workplace communications - is clearly difficult to ensure without full monitoring or some form of agreed redress mechanism. From the perspective of the Board, of course, while these outcomes should be encouraged, they presently fall outside their formal mandate.

**TABLE 9: If the matter did settle, in full or in part, did the resolution include an element that, in your experience, would not have been available through the adjudication process in this case? (Q8)**

| Table No: 9 Question 8 | | Yes | No | Not Sure |
|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent |
| All | 275 / 233 | 141 / 57% | 57 / 25% | 41/ 18% |
| Grievor | 61 / 54 | 19 / 35% | 11 / 20% | 24/ 24% |
| Grievor Rep | 54 / 46 | 29 / 63% | 17 / 37% | 0 / 0% |
| Employer | 14 / 11 | 8 / 73% | 3 / 27% | 0 / 0% |
| Employer Rep | 78 / 67 | 31 / 46% | 19 / 28% | 17/ 25% |
| Mediator | 68 / 55 | 48 / 87% | 7 / 13% | 0 / 0% |

Two further questions asked about outcome relate to changes in levels of understanding of one another's position, and any change in the parties relationship as a result of the mediation process.

**TABLE 10: In your view, did the mediation session clarify your/your party's understanding of the other side's perspective in this dispute? (Q9)**

| Table No: 10 Question 9 | | Yes Definitely | Yes Somewhat | No | Not Sure |
|---|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent | No. / Percent |
| All | 275 / 272 | 130 / 48% | 98 / 36% | 39 / 15% | 5 / 2% |
| Grievor | 61 / 60 | 19 / 32% | 27 / 45% | 10 / 17% | 4 / 7% |
| Grievor Rep | 54 / 53 | 30 / 57% | 16 / 30% | 6 / 11% | 1 / 2% |
| Employer | 14 / 14 | 1 / 7% | 7 / 50% | 6 / 43% | 0 / 0% |
| Employer Rep | 78 / 78 | 32 / 41% | 31 / 40% | 15 / 19% | 0 / 0% |
| Mediator | 68 / 67 | 48 / 72% | 17 / 25% | 2 / 3% | 0 / 0% |

In relation to clarifying understanding of the other side's position (Q9), it is noticeable that the representatives on both sides register a higher measure of change than their clients. This is especially striking in comparing employer representatives with employers (only one employer replied "yes, definitely" to this question, compared with 41% (n=32) of employer representatives). These responses may be reflecting the different types of understanding hoped for and anticipated by each group. The representatives may be answering this question by saying that they have far greater information about the legal and technical dimensions of the dispute- this would be compatible with the results for Q7, above - while the disputants themselves are looking for a more personal understanding of what lies behind the conflict. In either case, a large majority of respondents in all groups replied that their understanding was enhanced either "definitely" or "somewhat", with representatives placing themselves more often in the "definitely" category. Although the absolute numbers are small, it may also be noteworthy that a much larger percentage of employers (43%) compared with grievors (17%) stated that they had not achieved any clarification of understanding of the other side's position. It might be speculated that the 32% of grievors who said that their understanding of the other side was "definitely" enhanced by mediation, and the further 45% who stated that their understanding was "somewhat" enhanced, may have been placing greater emphasis than the employer group on the usefulness of the process to surface feelings and issues other than those formally presented[18].

**TABLE 11: In your view, as a result of the mediation session, is the relationship between this employee and this employer likely be worse. better or unchanged? (Q10)**

| Table No: 11 Question 10 | | Worse | Better | Unchanged |
|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent |
| All | 275 / 263 | 17 / 6% | 125 / 48% | 121 / 46% |
| Grievor | 61 / 61 | 8 / 13% | 18 / 30% | 35 / 57% |
| Grievor Rep | 54 / 48 | 4 / 8% | 24 / 50% | 20 / 42% |
| Employer | 14 / 13 | 0 / 0% | 6 / 46% | 7 / 54% |
| Employer Rep | 78 / 76 | 5 / 37% | 37 / 49% | 35 / 46% |
| Mediator | 68 / 65 | 1 / 2% | 40 / 62% | 24 / 37% |

On the question of relationship (Q10) , there are also some striking differences between the responses of grievors and the employers. No employers are reported as saying that the relationship is worse as a consequence of mediation compared with 13% of grievors who reach this conclusion. This may reflect the tendency for grievors to go into mediation with higher expectations than employers, especially in this area of personal relationships[19]. We also speculate that this result may reflect the different realities for employers and grievors of working in an uncomfortable or tense workplace. Employers are unlikely to feel that their position of relative power is affected by an unsuccessful effort to mediation. There are many more day-to-day consequences for employees for uncomfortable or hostile relationships with the employer, including concern over reprisals from employers. One respondent who said that the relationship was "unchanged" added "I am still afraid of the manager". Even without a fear of formal future action, some employees may feel that have ongoing issues that they have to face again after mediation. For example,

> "(The relationship is) worse. I was threatened with job loss if I didn't forget a situation which had lasted for over six and half years. I was put back with the same persons; I believe that I will be abused again and that I will not be able to talk about it to anyone."

However, respondents who said that the relationship was worse following mediation are significantly outnumbered by those in each group who stated that the relationship was better as a result of mediation (30% of grievors and 46% of employers). As one respondent put it, "bridges can now be built, whereas before mediation, there was only water." A number pointed to the importance of the actual disputants speaking to one another, instead of via representatives, in rebuilding some kind of working relationship. However, it should be noted that exactly the same

number of grievor respondents - 47% or n=129 - said that the relationship was "unchanged".

To conclude the questions on outcome, respondents were asked whether they felt "optimistic" or "sceptical" about mediating with this party again (Q11). This question was designed to provide further information on the state of the disputants' relationship post-mediation, as well as their general satisfaction with the process of mediation. While the results expressed a general level of optimism over the future bargaining relationship between the parties, grievors were more sceptical than all other groups. Interestingly, however, their representatives were the most optimist group. It is difficult to square this relatively high level of scepticism among grievors with the results from Q10, and in particular Q9 (see above) where grievors appear to be more "upbeat" about the outcomes from mediation than employers. However one possible explanation is that employee optimism about the mediation process and its potential for good outcomes - whether or not settlement occurs - is related more closely to support for the *principle* of structured direct negotiation with the employer, than it is to their feelings about this particular dispute and this particular employment relationship.

**TABLE 12: Did your experience in this mediation session with the other party make you skeptical, optimistic or unsure about mediating with this party in a future PSSRB mediation session? (Q11)**

| **Table No: 12 Question 11** | | **Skeptical** | **Optimistic** | **Not sure** |
|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent |
| All | 207 / 202 | 23 / 11% | 152 / 75% | 27 / 14% |
| Grievor | 61 / 60 | 14 / 23% | 41 / 68% | 5 / 8% |
| Grievor Rep | 54 / 52 | 3 / 6% | 46/ 88% | 3 / 6% |
| Employer | 14 / 14 | 2 / 14% | 9 / 65% | 3 / 21% |
| Employer Rep | 78 / 76 | 4 / 5% | 56 / 74% | 16 / 21% |

### 3. Outcomes Summary

A combination of questionnaire and PSSRB database data regarding outcomes of mediation suggests that mediation during the evaluation period was an efficient mechanism to achieve settlement in a respectable proportion of cases. An overall settlement rate of more than 50% is comparable with other opt-out mediation programs which may be time limited[20].

There is very strong data to suggest that mediation is being used effectively to generate outcomes either not available via, or seen as not appropriate for, adjudication. These outcomes relate to the development of practical workplace solutions which may lay the foundation for better working

relationships. However, there are also concerns from grievors regarding follow-through with such voluntary arrangements.

The difference in perceptions between grievors and employers regarding the nature and substance of conflict must be understood in light of the power dynamics of the employment relationship. Grievors are far more likely than employers to see outstanding, unresolved issues following mediation and a small number express a concern about going back into a workplace without a formal change in their circumstances. Nonetheless, grievors also appear to be more positive about the benefits of direct negotiation with the employer even where settlement is not reached (or is, in their view, only "partial"). Close to half of both employers and grievors stated that they believed that their relationship was better as a result of mediation.

## PART FOUR: Process

### 1. Overall Perceptions

Perceptions of the fairness and effectiveness of the PSSRB's mediation process will be critical to the ultimate acceptance of mediation as a viable alternative to adjudication by the PSSRB. Research suggests that disputants are concerned with two types of fairness: procedural justice (the fairness of the process through which the decision is made) and distributive justice (the fairness of the outcome). Further, procedural justice can be more important to satisfaction than distributive justice.[21] Important elements of procedural justice include: providing parties with an opportunity to voice their concerns; party control over process and decision-making in mediation; fair and impartial treatment by the neutral; adequate information; an opportunity for assistance; voluntary participation; and enforceability.[22]

Questions 12-20 deal with participants' perceptions of the mediation process, and elicit responses directly related to several procedural justice measures. Parties and their representatives were asked to report on their perceptions of: the fairness of the process; specific aspects of the mediator's effectiveness and neutrality; whether they had a sufficient voice in the process; whether the length of the mediation was appropriate; whether they thought the mediator should be assigned or chosen by the parties. They were also asked to identify the techniques and interventions that the mediator used. Several questions (Q12, Q13, Q15, Q19, Q20) provided space for respondents to add additional comments to their survey choices. Question 17 is an open-ended question allowing parties to comment on what, if anything they would have liked the mediator to have done differently. The mid-evaluation focus group discussions also reviewed several of these questions. Finally, mediators were asked to identify the techniques and interventions they used during the mediation and to comment on the length of the mediation session.

The general pattern of the survey data and the written comments indicate an overall positive experience with mediation at the PSSRB and general approval of the mediator's conduct and role. A significant majority of respondents in all groups rated the process fair and found the mediator to be effective. However the quantitative data and qualitative comments also include some instructive differences as to the degree of approval between grievor and employer side

respondents on both fairness (whether they chose "very fair" over "somewhat fair") and mediator's effectiveness, (whether they chose "very effective" over "effective"). As well the data shows a significant divergence in opinion between grievors and their own representatives.

## 2. Parties Perceptions of Fairness

A general question about the fairness of the mediation process (Q12) received a highly positive response. Overall between 92% and 96% of respondents choose the two highest categories "very fair" and "somewhat fair", and the majority of respondents in all categories evaluated the mediation as "very fair". Even when parties reported that they did not settle (n=25) participant satisfaction remained high (92% "very fair" and "somewhat fair") .[23]

**TABLE 13: Overall, would you say that the mediation process was very fair ...? (Q12)**

| **Table No: 13 Question 12** | | **Very Fair** | **Somewhat Fair** | **Somewhat Unfair** | **Very Unfair** |
|---|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent | No. / Percent |
| All | 207 / 202 | 130 / 64% | 65 / 30% | 7 / 3% | 5 / 2% |
| Grievor | 61 / 61 | 31 / 51% | 26 / 43% | 0 / 0% | 4 / 7% |
| Grievor Rep | 54 / 51 | 44 / 86% | 5 / 10% | 1 / 2% | 1 / 2% |
| Employer | 14 / 13 | 9 / 69% | 3 / 23% | 1 / 8% | 0 / 0% |
| Employer Rep | 78 / 77 | 46 / 60% | 26 / 34% | 5 / 7% | 0 / 0% |

There are however some marked differences among the respondent groups in terms of their degree of enthusiasm. Grievor representatives were particularly positive (86% describe the mediation process as "very fair"). As well, a strong majority of employer side respondents also choose "very fair" (60-69%), however they were more qualified in their assessment. Finally, while a majority of employees (51%) choose "very fair", they were considerably less willing to give the highest approval rating than the other groups and in particular their assessment of fairness is far more tempered than that of their own representatives. Factors which may have impacted on these differences are discussed below.

Only a handful of respondents (n=13) chose "somewhat unfair" or "very unfair". Their written comments primarily cite dissatisfaction with mediator conduct and mediator bias, for example: "... the mediator was so confrontational it immediately put me on my guard.."; "The mediator stated in front of both parties that the employer would loose if the mediator were the arbitrator" (translation); "The mediator in this case was not impartial. She had a predisposition which she let the parties know through her words and non-equal treatment" (translation).

Parties who choose the second highest rating, "somewhat fair", gave more varied reasons, and there are interesting differences between the types of comments made by grievor side respondents compared to employer side respondents. Grievors side respondents explained their answer in terms of: disappointment with the settlement outcome; concern about the disrespectful tone or attitude adopted by the employer; a perception that the employer came to mediation with a limited settlement mandate, unrealistic expectation or fixed position. In contrast, employer side respondents who choose "somewhat fair" were more likely to comment negatively on the process itself, and on poor, ineffective or biased mediator conduct.[24]

Positive comments accompanying question 12 complimented the mediator on a good explanation of process, a calm manner and approach, instilling confidence, allowing both parties to be heard, neutrality and impartiality, and leading both parties towards compromise.

### 3. Differences Between Respondent Groups

Party satisfaction with procedural justice depends in part on their comfort level with both the process (how it works) and the substance of the dispute (what will be discussed and who will be there).[25] Accordingly, some of the differences between the participant groups' relative assessments of fairness emerging in this evaluation may be explained by the parties' relative familiarity with the mediation process (Q2 and see Part Two above); and their relative perceptions of how prepared they were for the mediation (Q3 sufficiency of information, and see Part Two above). In addition, employer-side respondents expressed a further distributive justice concern that a mediated settlement would require greater compromises on their part.

The observation that experienced and repeat users of a mediation process tend to view the process more favourably is borne out in the data in this study. Grievor representatives, who had the strongest fairness appraisal, (86% "very fair") also had significantly more experience and therefore had developed a higher comfort level with the mediation process -75% of grievor representatives had previous mediation experience compared to grievors (13%) and employers (21%) and employer representatives (49%.) Grievors, who were the least likely to choose "very fair", (51%) were both the least experienced (only 27% reported any prior mediation experience) and the most likely to report in question 3 that they did not have sufficient information prior to the mediation (31% compared to 7-14% for the other respondent groups).[26]

The written survey comments that accompany Q 3 (sufficiency of information) further elucidates the correlation between experience, information and the parties' ranking on degree of fairness. Although grievor representatives, employers and employer representatives were relatively uniform in reporting that they had sufficient information prior to the mediation, (86%-96% chose "Yes" in Q3), their comments on the short comings of the information provided are very different, and may reflect their relative experience levels. Very few grievor representatives commented on lack of information about the mediation process; what they wanted were more specific details on who would be attending. In contrast employers, employer representatives and grievors wanted basic information on the mediation process itself, raising questions such as: "what was the scope of a mediation"; "who and what roles the different players have"; and what

are the "basic rules". This is commensurate with their relative lack of experience.

In considering the significant difference between grievors and their own representatives, one point raised during the focus groups and in some of the written comments may offer an additional partial explanation. Several grievors noted a need for more pre-mediation contact with their representatives. During the focus group discussions, some grievor representatives also acknowledged this to be a shortcoming in their pre-grievance preparation. Procedural justice research suggests that in order to feel fairly treated, parties need to feel they have adequate access to assistance[27]; a need that was perhaps not fully met for grievors here. There may be resource issues outside of the PSSRB's control contributing to some grievor's perception of fairness.

Employer side respondents were also more tempered in their assessment of fairness than grievor representatives. In this regard, there is some anecdotal evidence to suggest that employers are predisposed to see mediation as a forum which will provide them with less favourable distributive outcomes than adjudication, with which they may be more comfortable. During both the mid-evaluation focus group discussions and the focus groups conducted prior to designing the survey questionnaire, employers expressed the view that if they participated in mediation, they would inevitably have to give ground on an issue, "even if they have a strong legal case". In discussing this perception one focus group participant attributed this in part to the nature of the issues presented in PSSRB mediations. 'It is inherent, that the employer will feel like it has to give, but that's because the issue is about giving (money, vacation, promotions, and so on) as opposed to a personal dispute.' This is also reflected in the following written comments:

> "The perception of the mediation is that the employer had to give something or the griever would proceed to adjudication. There was a sense that the employer was responsible to find a resolution. In fact this was true. The employer had more of an expectation to make this work and avoid the costly alternative." (Q 12)

> "Mediation should not simply be a matter of how much money the department will throw at the employee- it should be a matter of resolving an issue so that both sides are treated fairly and appropriately." (Q17)

Other specific employer side reservations about the fairness of mediated settlements also focused on distributive justice concerns, such as: creating an inappropriate precedent, the impact on office morale if a 'system abuser' is perceived as gaining and the possibility that employees could walk away with something to which they are not entitled. Some employer-side comments reflect the overall relationship between union and management in the public service. "Union using this process as a victory seeking device". Finally, in the focus group discussions employer side respondents also reported that they feel pressured by government policy to mediate, "even if the case is good"; moreover, they do not get the same legal support from the Treasury Board in a mediation that they would have had if the case had gone to adjudication. These factors may all impact on the employer side assessment of fairness.

Perceptions of fairness also require participants to feel that the outcomes of the mediation will be enforceable. This issue was raised by parties from both groups during the mid-point focus group discussion. Two grievors reported that their mediated settlements were not acted upon, that they were unable to reach anyone from their own union who could take action and that they did not know what the PSSRB's role or procedures were on the issue of compliance with settlements. The desirability of some form of follow-up on enforcement was also raised in the employer side focus group where it was suggested that the mediator might be assigned to the case "for a period afterwards, for potential problems re: enforcement - stay with a file until there is some real resolution - not just a written agreement". Any perceived problems with enforcement of mediated settlements would not likely have been captured in the survey questionnaire data or narrative comments, since the questionnaire was generally filled out in close proximity to the mediation itself, before any enforcement or follow-up issues would have arisen. It must be emphasized that these focus group comments are not a solid basis for any conclusions that there is currently a problem with enforcement of mediated agreements. However, they do suggest that it may be important to provide parties with information on follow-up procedures, and that in appropriate cases more procedural compliance steps might be included in settlement terms. Finally, in the future it may be useful to follow-up or monitor enforcement of agreements.

## 4. Mediator Effectiveness, Mediator's Role, Conduct of the Session and Avoiding Bias

Question 13 asked for an overall assessment of the mediator's effectiveness which was then followed up in with more specific questions on: whether the parties' felt that the mediator understood their party's view of the dispute( Q14); how effective the parties thought the mediator was in helping them communicate with one another and in reaching some common understandings (Q 15); and whether they felt they had sufficient opportunity to have their say (Q 20). In question 16 parties selectively checked off the techniques and interventions used by the mediator and indicated whether they thought the mediator avoided bias. Mediators also answered question 16, allowing a comparison between the parties' perceptions and the mediator's own sense of their role and conduct in the mediation. Finally Question 17 was an open-ended question soliciting comments on what participants would have liked the mediator to do differently.

The overall pattern is highly positive with very few respondents choosing "ineffective" (n=11) or "very ineffective" (n=3) in question 13, or reporting a negative response in any of the more specific questions;(14 "not at all" n=6; Q15 "ineffective" n=14 and "very ineffective" n=2; Q 20 "No" n=16). Question 20 yielded particularly strong results; between 88- 94 % of party respondents said they had their say in the mediation and this percentage held (92%) even when parties reported that they did not settle (n=25).

Where there are differences between respondent groups they generally follow the pattern described above in relation to question 12. The grievor representatives most often give the highest approval rating in every category. The individual grievors and employer side respondents are more evenly distributed - although in different degrees- between the highest and second

highest rating and they put more qualifiers in their written comments and express some nuanced reservations about their experience.

Question 16 provides some data on the parties' perception as to how actively involved the mediator was in assisting the parties in their decision making process. Parties could indicate whether the mediator recommended a particular settlement, suggested possible options for settlement, advised on his or her views on legal issues, was silent on his or her views on the case. It also provides another measure of party perception of mediator effectiveness by asking whether the mediator kept control over the structure and flow of the discussions. Question 16 also specifically asks about the participants' perception of bias.

The responses to question 16 are relatively consistent among the reporting groups with a few exceptions. All parties, including the mediator checked "advised you on his or her views of any legal issues" approximately 42% of the time (36-46%). Parties were more likely to indicate that the mediator would "suggest possible options for settlement"(59-79%) than "recommend a particular settlement to you" (15-36%). Grievors were more inclined to hear the mediator's intervention as a recommendation (36%) than other respondents (15-21%). Finally, only approximately 31% of all parties (22-37%) thought that the mediator kept silent on his or her views of the case, indicating that the mediator probably expressed an opinion. This is consistent with the mediator's response that they kept silent on their views in only 25% of the mediation sessions. The parties were also relatively consistent with each other on whether the mediator controlled the flow (71-86%) and avoided bias (71-78% ). Comparing the mediator's responses with the party's perception we see that the mediators choices were within the same frequency range as the other respondents, with the exception of their self assessment on controlling the flow and avoiding bias which they choose with far greater frequency (93% and 90% respectively).

The data collected in question 16 must be put in the context of the pilot program's own expectation that the mediator would have a facilitative role. The fact that mediators report that they provided legal advice to the parties in 41% of their mediation sessions, recommended a particular settlement 25% of the time and were only silent on their views of the case 25% of the time, has future training implications that will be discussed below.

Question 16 does not ask respondents to indicate their preferences regarding the types of mediator interventions, only to report on what they thought occurred in their session. Party preferences and expectations are expressed more directly in the comments to question 13, 15 and 17 and can be viewed in the light of the data gathered in question 16. Also insight on what type of conduct parties perceive as demonstrating bias is contained in some of these comments. These points are discussed below.

**TABLE 14: How would you assess the role played by the mediator? (Q13)**

| Table No: 14 Question 13 | | Very Effective | Effective | Ineffective | Very Ineffective |
|---|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent | No. / Percent |
| All | 207 / 202 | 109 / 54% | 80 / 39% | 10 / 5% | 3 / 1% |
| Grievor | 61 / 61 | 36 / 59% | 22 / 36% | 1 / 2% | 2 / 3% |
| Grievor Rep | 54 / 51 | 37 / 73% | 10 / 20% | 4 / 8% | 0 / 0% |
| Employer | 14 / 13 | 2 / 15% | 10 / 77% | 1 / 8% | 0 / 0% |
| Employer Rep | 78 / 77 | 34 / 45% | 38 / 50% | 4 / 5% | 1 / 1% |

**TABLE 15: How well would you say that the mediator understood your/your party's view of this dispute? (Q14)**

| Table No: 15 Question 14 | | Very Well | Somewhat | Not at All |
|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent |
| All | 207 / 202 | 160 / 79% | 38 / 18% | 5 / 3% |
| Grievor | 61 / 60 | 46 / 77% | 13 / 22% | 1 / 2% |
| Grievor Rep | 54 / 52 | 46 / 88% | 6 / 12% | 0 / 0% |
| Employer | 14 / 14 | 9 / 64% | 5 / 36% | 0 / 0% |
| Employer Rep | 78 / 76 | 59 / 78% | 13 / 17% | 4 / 5% |

**TABLE 16:** **How effective was the mediator in helping the parties communicate with one another and reach some common understandings? (Q15)**

| Table No: 16 Question 15 | | Very Effective | Effective | Ineffective | Very Ineffective |
|---|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent | No. / Percent |
| All | 207 / 199 | 111 / 56% | 74 / 37% | 13 / 7% | 1 / 1% |
| Grievor | 61 / 61 | 39 / 64% | 19 / 31% | 2 / 3% | 1 / 2% |
| Grievor Rep | 54 / 49 | 36 / 73% | 11 / 22% | 2 / 4% | 0 / 0% |
| Employer | 14 / 14 | 3 / 21% | 9 / 64% | 2 / 14% | 0 / 0% |
| Employer Rep | 78 / 75 | 33 / 44% | 35 / 47% | 7 / 9% | 0 / 0% |

**TABLE 17: In the mediation session, did the mediator ... ? (Q16)**

| Table No: 17 Question 16 | | Advise on Views of Legal Issues | Recommend a Particular Settlement | Suggest Settlement Options | Keep Silent on Views of Case | Control Process | Avoid Bias |
|---|---|---|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No. / Percent | No. / Percent | No. / Percent | No. / Percent |
| All | 275/ 271 | 114 / 42% | 64 / 24% | 187/ 69% | 82 /30% | 232/85 % | 218/80 % |
| Grievor | 61/61 | 28 / 46% | 22 / 36% | 39/ 64% | 20 /33% | 49/ 80% | 47/77% |
| Grievor Rep | 54/51 | 24 / 47% | 10 / 19% | 40 / 78% | 12 /24% | 43 /80% | 42/82% |
| Employer | 14/14 | 5 / 36% | 3 / 21% | 11 / 79% | 4 / 29% | 10 /71% | 10/71% |
| Employer Rep | 78/78 | 29 / 37% | 12 / 15% | 46 / 59% | 29 /37% | 67 /86% | 58/74% |
| Mediator | 68/67 | 28 / 41% | 17 / 25% | 51 / 75% | 17 /25% | 63/93% | 61/90% |

**TABLE 18: Did you feel that you had sufficient opportunity to have your say? (Q20)**

| Table No 18: Question 20 | | Yes | No |
|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent |
| All | 207 / 203 | 188 / 93% | 15 / 7% |
| Grievor | 61 / 60 | 53 / 88% | 7 / 12% |
| Grievor Rep | 54 / 52 | 49 / 94% | 3 / 6% |
| Employer | 14 / 14 | 14/ 100% | 0 / 0% |
| Employer Rep | 78 / 77 | 72 / 94% | 5 / 6% |

## 5. Themes Emerging in the Comments

Question 17 and the additional space for comments accompanying questions 13 and 15 gave parties an opportunity to explain and expand on their responses and offer suggestions for improving the process. At the outset, it should be noted that the written responses include many positive and complimentary comments on the mediators' performance as well as overall positive reports on the mediation experience at the PSSRB. This is important as the questions were generally phrased to elicit an explanation for why a respondent had chosen a response in the negative range, or what they would have liked to have been done differently. In this context the positive or complimentary remarks can be seen as an effort to ensure that countervailing positive feedback is received along with critical comments. Also, in evaluating the written comments, it must be kept in mind that very few respondents chose "ineffective" and "very ineffective", so that most of the qualifying and critical comments are actually from persons who choose the second highest rating "effective" over "very effective").

Some themes emerge in the comments to questions 13, 15 and 17 that relate to mediator style (which can range in various degrees from facilitative to evaluative) and the use by mediators of certain interventions, most particularly meeting separately with each side or "caucus". These same themes are present in the mediation literature, where there is some considerable debate.

Other one-off, critical narrative comments suggested that the mediator didn't understand their circumstances ("the realities of both parties") or that the mediator came into the mediation with fixed or strong views on what a solution should include; or that the party felt challenged by the mediator and "had to convince the mediator of their point of view"; and in a few instances that the mediator was biased.[28]

## 6. Comments on the Use of Private Caucus

In Question 15, the single most repeated reason given for finding the mediator ineffectual in enhancing communication between the parties was a reliance on a form of shuttle diplomacy by the mediator and the resulting lack of face-to-face communication between the parties. This was also brought up by several respondents in question 17 as something they would have liked the mediator to have done less often. Respondents noted that caucusing doesn't give the "desired communication", that understanding is not created, and that important issues don't come out or are understated; it feels like "horse trading rather than communication"; and that technical issues can't be properly conveyed through an intermediary. Caucusing was also cited as creating distrust of the other side as well as with the mediator.[29] These comments on what the parties find ineffectual about the caucus style of mediation should furthermore be read in light of comments to question 10 where parties noted the value of the face to face communication as a positive outcome.

There is great variation among mediators and among mediation programs on the use of private caucus sessions, as opposed to joint sessions where all the parties are present. Some mediators prefer to keep the parties together as long as possible and only move into private caucus to

accomplish specific objectives. For example the mediator might want to test a settlement option privately, or might need to deal with inter-personal dynamics if intense emotions have escalated to the point where the parties can't make effective decisions in joint session. Other mediators routinely separate the parties after the initial opening statement and shuttle back and forth between rooms.

As noted in the mediation literature, the effective use of caucus requires consideration of, among other things: timing, a protocol about confidentiality of information shared in the caucus, the principle of equal time with the mediator, rules for conveying information to the other party, and a procedure for the initiation of a caucus. Critics note that caucus can shift enormous power to the mediator who can manipulate the parties into an agreement by controlling, suppressing or enhancing information while depriving the parties of an opportunity to test the information themselves through a face to face discussion. Distrust among parties and concerns about mediator bias can also arise because of party insecurity over what is being said behind closed doors.[30] Some of the comments by participants in this study reflect these problems. As well, over use of caucus may work counter to the PSSRB's stated goals of placing responsibility on the parties to find a workable solution and enhancing the dispute resolution skills of participants.

The use of private caucus and shuttle diplomacy corresponds to one of the traditional styles of dispute resolution in the labour relations area. When government mediators intervene to settle a collective bargaining dispute the party representatives and the mediator shut themselves into either a single hotel room or separate rooms and negotiate to the point of exhaustion. The stereotype of the mediator paints a portrait of an interventionist, brow-beating individual who forces the parties to compromise their divergent and incompatible positions. This approach has proven quite successful in forcing the negotiation of collective agreements. This technique is, however, very different from interest-based mediation which emphasizes collaboration for mutual gain.

### 7. Constructive Comments (Q17 -What would you have liked the mediator to have done differently?)

Question 17 - which asks what, if anything, would you have liked the mediator to have done differently - yielded many constructive comments. As already noted, several respondents commented on an over reliance on caucus and "shuttle diplomacy" which detracted from communication, trust building and promoting future relationships between the parties. A few made some concrete suggestions such as: becoming better acquainted with other issues (for example an allegation of harassment) that pre-existed between the parties; seating the parties so that they are not on opposite sides of the table; allowing more emotional venting; not shying away from emotional conflict; not putting people in the same room where one has accused the other of sexual harassment; orienting participants to the need to consider "win/win not win/lose"; and more explanation of the process which can be "overwhelming". Also instructive was positive feedback complementing a mediator's effective use of pre-mediation conferences, in which the mediator encouraged pre-mediation exchanges of information between the parties. The mid-evaluation focus group discussion provided the following additional points: the mediation

settlement should include a communication plan; and that written agreements need to be more detailed and should contain clauses providing absolute confidentiality of the mediation discussions.

## 8. Diversity in Mediator Styles: the Debate over Evaluative and Facilitative Approaches

The majority of the comments in question 17 deal with participants' preferences for different mediation styles. Diversity within the mediation community exists on virtually every aspect of the mediation process and produces a wide range of mediation strategies and techniques[31]. Participant comments reflected one of the most hotly debated issues arising from a key difference in mediation approaches - whether a mediator should adopt a purely facilitative role -promoting and managing discussion, surfacing issues, setting agenda, promoting communication- or an evaluative role in which the mediator provides a non-binding opinion on fact , law or the issues in general. There is a continuum of approaches with many mediators expressing a preference or leaning towards one end of the spectrum or the other, but also varying their approach depending on the context of the dispute or the specific objectives of the mediation program. For example, mediators who are inclined to use a communication oriented facilitative approach, may none-the-less ask the parties a series of "reality checking" questions in a private caucus, thereby adopting some evaluative techniques. A mediator who is willing to provide the parties with an assessment or prediction on the likely outcome of a court decision may also, at the same time, encourage the parties to focus on the underlying business and personal issues is arriving at the actual settlement terms.

Evaluative mediators are sometimes chosen by parties for their subject matter expertise and the parties may be interested or expecting a non-binding opinion on the relative merits of their legal positions as well as suggestions on options. Several respondents suggested that they would have found it helpful and would have welcomed an opinion by the mediator on what might have happened in an adjudication. Others wanted more help in generating realistic options and consonant with this, one respondent praised the mediator for providing suggestions on options that they hadn't considered. A few wanted the mediator to give the other party a realistic assessment (presumably because they assumed that their own case was the stronger of the two).

However other respondents raised very strong objection to the mediator giving an opinion, particularly when the opinion was offered in a joint session with all parties present. In the survey written comments this type of intervention was equated with mediator bias. Respondents' critical comments on mediator evaluation reflected several of the practice- related critiques that arise in the facilitative versus evaluative debate. For example, one respondent noted that as soon as the mediator gave an opinion, the other side stopped any real bargaining. Also, the evaluation created confusion as to the process itself, with respondents noting that the mediator was a "quasi-arbitrator" or that the mediator, "didn't know what hat to wear".

These comments must also be placed in the context of the responses to question 16, the program's own expectation that the mediator would have a facilitative role and the program's decision to assign mediators rather than have parties choose their own. Mediation theorists and

practitioners recognize the difficulty - and some would say the impossibility - of a mediator maintaining an aura of neutrality and impartiality while at the same time giving an opinion on facts and law.[32] As previously noted, party reporting on question 16 suggests that that Board mediators are often prepared to be evaluative by giving legal opinions and did not often refrain from giving their views on the case. This may explain why a significant percent (24%, n=50) of respondents did not see the mediator as having successfully avoided bias (Q 16)[33] Further, since this mediation program is an option offered in the context of an existing adjudicative process, it is important to the integrity of both processes that clear lines are maintained between them- parties need to feel confident that having opted for mediation, they will not be getting a watered-down version of adjudication. The program preference for facilitative mediation can also be understood in light of several of the program objectives (placing responsibility on the parties to find a workable solution; enhancing the dispute resolution skills of all participants). Finally since mediators are assigned, not chosen by the parties, the parties may find it less acceptable when the mediator provides an evaluation which they have not requested.

9. **Process Satisfaction: Length of Mediation and Choice of Mediator**

Parties report that almost all mediations have extended over more than 3 hours (over 90%) and a considerable percentage have been over 6 hours. (48%)[34] (Q18). A strong majority of respondents appear satisfied that this is neither too long nor too short. (79-88% parties; 90% mediators). Satisfaction with the length of the mediation session is another indication that the parties consider the process to be fair - it gives them sufficient time in which to have their say. As expected, this result is consistent with the strong positive response in Question 20 discussed above.

Question 19 asked the parties whether they would be interested in selecting their own mediator. The only group that appears to have an interest in this is grievor representatives (39% saying "yes"). The answer for the other groups is a resounding negative. The narrative responses of grievor representatives seemed to indicate that they were content if they were assigned the "right" mediator i.e. someone they liked and trusted or who was familiar with the department or institution, but not happy if assigned someone they did not feel comfortable working with. Comments from other groups regarding choice were primarily unenthusiastic, and expressed some concern that if the parties choose the mediator, an element of bias might be introduced.

**TABLE 19: How long was your mediation session? (Q18A )**

| Table No: 19 Question 18A | | > 6 Hours | >3 < 6 Hours | < 3 Hours |
|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent |
| All | 275 / 271 | 137 / 48% | 109 / 40% | 32 / 12% |
| Grievor | 61 / 61 | 27 / 44% | 27 / 44% | 7 / 11% |
| Grievor Rep | 54 / 52 | 23 / 44% | 23/ 44% | 6 / 12% |
| Employer | 14 / 14 | 10 / 71% | 4 / 29% | 0 / 0% |
| Employer Rep | 78 / 78 | 33 / 42% | 35 / 45% | 10 / 13% |
| Mediator | 68 / 66 | 37 / 56% | 20 / 30% | 9 / 14% |

**TABLE 20: And this was about right, too long, or too short? (Q18B)**

| Table No: 20 Question 18 (b) | | About Right | Too Long | Too Short |
|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent |
| All | 275 / 233 | 199 / 86% | 21 / 9% | 13 / 5% |
| Grievor | 61 / 56 | 45 / 80% | 5 / 9% | 6 / 11% |
| Grievor Rep | 54 / 40 | 35 / 88% | 3/ 7% | 2 / 5% |
| Employer | 14 / 14 | 11 / 79% | 3 / 21% | 0 / 0% |
| Employer Rep | 78 / 70 | 60 / 86% | 7 / 10% | 3 / 4% |
| Mediator | 68 / 53 | 48 / 90% | 3 / 6% | 2 / 4% |

**TABLE 21:** **Do you feel that selecting your own mediator would have been beneficial to the parties? (Q19)**

| Table No: 21 Question 19 | | Yes | No |
|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent |
| All | 207 / 198 | 38 / 19% | 160/ 81% |
| Grievor | 61 / 60 | 9 / 15% | 51 / 85% |
| Grievor Rep | 54 / 51 | 20 / 39% | 31 / 61% |
| Employer | 14 / 13 | 0/ 0% | 13 / 100% |
| Employer Rep | 78 / 74 | 9 / 12% | 65 / 88% |

10. **Process Summary**

Participants expressed strong satisfaction with the overall fairness of the PSSRB mediations. The mediators received an excellent overall approval rating for their effectiveness and are highly rated for understanding the parties perspectives, promoting communication and assisting parties to find common ground. Parties feel that they have a voice in the mediation and are being heard and understood by the mediator. This latter point is important as it is a strong indicator that participants' procedural justice needs are being met.

Grievor representatives, who have the most experience with mediation of any respondent group, give the highest approval ranking in all areas. Other groups are more balanced between the highest and second highest rankings. There are very few respondents selecting negative rankings. Participant satisfaction remains high even when no settlement was reached.

Narrative comments collected via the written questionnaires or in focus groups contain many constructive points. Two of the most significant relate to the possible over-use of private caucus meetings and a tendency for some mediators to adopt an evaluative style by giving legal opinions. Finding the appropriate and effective balance between a mediator's use of subject matter expertise (desired by some program participants) and creating perceptions of bias by providing a legal opinion (complained of by others) is a need that should be addressed in future training.

Finally the length of mediation sessions is satisfactory, and most parties are satisfied with the current system whereby the mediator is assigned rather than chosen by the parties.

**PART FIVE: Future**

The last two questions on the survey ask respondents to place their experience with this mediation in a hypothetical future context.

A significant number of respondents stated that their experience in mediation would make a difference to how they handled a future dispute. Grievor representatives were the least likely to indicate that they would change in the future (67% said "No") while employers were the most likely to change what they do (69% said "Yes"). The other two groups were fairly evenly split (43% Yes/ 57% No). The employers provided very few narrative comments explaining how their experience would actually influence them in the future. The other respondents provide comments which can be broken down into three broad categories.

First, the most prevalent comments are from those who found the mediation experience very positive. These respondents variously reported that they would recommend mediation to others, that they would look for earlier opportunities to mediate or simply noted something positive they had learned about mediation. A second category of respondents noted how they personally would improve their effective participation in mediation by being better prepared, behaving in a less confrontational manner another time, making sure that appropriate persons with authority to settle were present, and coming in with "an-open mind". Finally a smaller number of comments were made by persons who considered the mediation a waste of time, an unnecessary additional expense, and who would not be willing to mediate again at the PSSRB. Although none of the employers respondents provided written comments, in the mid-evaluation focus group discussion some employer side participants suggested that they would like some training in how to use the mediation process. In particular they would appreciate training in how to prepare for interest-based negotiation processes; how to evaluate settlement proposals; and how to evaluate when mediation is an appropriate mechanism for dispute resolution.

**TABLE 22:** **Would your experience in this mediation session make any difference to how you would deal with another case which you knew could eventually be referred to mediation at the PSSRB? (Q21)**

| **Table No: 22 Question 21** | | **Yes** | **No** |
|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent |
| All | 207 / 196 | 85 / 43% | 111/ 57% |
| Grievor | 61 / 60 | 27 / 45% | 33 / 55% |
| Grievor Rep | 54 / 49 | 16 / 33% | 33 / 67% |
| Employer | 14 / 14 | 11/ 79% | 3 / 21% |
| Employer Rep | 78 / 73 | 31 / 42% | 42 / 58% |

In responding to the final question, a strong majority state that they would use the pilot mediation at the PSSRB again. Support for this view is strongest among grievor representatives (82% said "Yes Definitely"), and the most mixed among employers (54% said "Yes Definitely and 38% said Yes Probably"). Only a handful of respondents (3% n=6) said they would not use the mediation process again at the PSSRB. Once again the most experienced group, grievor representatives, are the most enthusiastic, with other groups generally strongly supportive although to a lesser degree.

**TABLE 23: Would you choose to use mediation again at the *PSSRB?* (*Q22*)**

| Table No: 23 Question 22 | | Yes Definitely | Yes Probably | No | Don't Know |
|---|---|---|---|---|---|
| | No. / Valid No. | No. / Percent | No. / Percent | No./ Percent | No. / Percent |
| All | 207 / 200 | 130 / 65% | 56 / 28% | 6 / 3% | 8 / 4% |
| Grievor | 61 / 61 | 35 / 57% | 18 / 30% | 5 / 8% | 3 / 5% |
| Grievor Rep | 54 / 50 | 41 / 82% | 8 / 16% | 0 / 0% | 1 / 2% |
| Employer | 14 / 13 | 7 / 54% | 5 / 38% | 1 / 8% | 0 / 0% |
| Employer Rep | 78 / 76 | 47 / 62% | 25 / 33% | 0 / 0% | 4 / 5% |

**PART SIX: Conclusions and Recommendations**

**1. The PSSRB should create a permanent mediation step in the procedure for the presentation of grievances under the *Public Service Staff Relations Act.***

The PSSRB's pilot mediation project has achieved a high degree of credibility and party satisfaction with a large majority of participants indicating that they considered the process to be a fair and constructive approach to dispute resolution. An overwhelming majority also said that in the future they would be willing to participate in mediation at the PSSRB should the need arise. Mediated outcomes have included practical solutions that were not otherwise available through the Board's adjudicative proceedings and both grievors and employers report a greater interest in using informal dispute resolution processes in the future. From the information available to us, mediation has not delayed case processing time.

**2. Pre-mediation information should be provided directly to the parties as well as to their representatives.**

Participants expressed satisfaction with the information they had in advance of the mediation, as well as with the overall logistics and organisation of their mediation session. However all participants, and particularly grievors and employers need more basic information about the mediation process prior to the mediation session. Pre-mediation information could include an explanation of the problem solving orientation of mediation sessions, a description of the process including who attends, the mediator's role, the parties' role, how mediation differs from the tribunal's adjudicative process, and how confidentiality is maintained. This information should

be sent directly to these parties rather than via their representatives.

3. **The PSSRB should find means of augmenting education and training for participants in the grievance process.**

Pre-mediation education could be provided through a variety of sources ranging from pamphlets, fact sheets, Q and A s, educational videos, an educational website with mediation scenarios illustrating elements of the process and the problem solving orientation, periodic orientation sessions, to a PSSRB contact person available to answer basic questions as well as provide the parties with more specific information on their own mediation (for example, who will be present). The pre-mediation conference (see below) could also play a role here.

4. **The PSSRB's protocol for mediation should include a pre-mediation conference stage at which the mediator contacts the parties individually to review the mediation process and any preliminary issues.**

A pre-mediation conference would provide the mediator and the disputants with an opportunity to ensure that the appropriate parties with authority will be present, to identify issues in dispute and to canvas information that could be effectively exchanged in advance, or should be brought to the mediation. This initial orientation would provide parties with a basic knowledge of the process, thus increasing their comfort level with mediation, and can alert the mediator to any special needs or concerns of the parties.

5. **The PSSRB should ensure that adequate rooms, including private caucus meeting rooms, for all parties.**

This concern was expressed primarily with respect to mediations held in the regions.

6. **The PSSRB should pursue ongoing and advanced mediation training for new and experienced mediators, stressing the importance of a facilitative approach to mediation.**

The PSSRB's mediation training offered to Board members has provided good coverage of the fundamentals of mediation. Participants were very satisfied with the role and conduct of the mediator, reporting that the mediator was effective, understood their perspective, assisted the parties in communicating with each other and establishing common ground and provided a forum where they could be heard. A majority of participants reported that the mediator effectively controlled the process and avoided an appearance of bias.

The PSSRB's expectation that mediations would follow a facilitative model appropriately supports several other program goals, including placing responsibility on the parties to find a workable solution, increasing the likelihood that employees and employers will use informal dispute resolution processes in the future, and enhancing the dispute resolution skills of all

participants. A facilitative mediation process also maintains the integrity of the PSSRB's adjudicative process. It enables a fairly clear line to be drawn between the two types of processes by ensuring that when parties take part in mediation they are participating in an assisted negotiation, and that when they appear before the board in an adjudicative hearing they will receive a third party decision on the merits of their case. An evaluative approach to mediation in which mediators provide the parties with a non-binding prediction on the likely outcome of an adjudication or provide their assessment of factual or legal issues will blur this distinction, and furthermore is likely to be equated with mediator bias in the minds of the parties. A number of participants in the mediation pilot indicated that the mediator in their case offered a legal evaluation, and some expressed resistance to this.

Refresher mediation training can increase mediator effectiveness of both experienced and new mediators. Experienced mediators benefit from opportunities to discuss strategies, techniques and effective and ineffective interventions. Topics which would be particular useful, taking into account the constructive comments in the responses to the questionnaire and focus group discussions include:

i) Effective use of pre-mediation conferences
ii) Effective use of caucus
iii) Elements of a durable agreement
iv) Creating communication plans
v) Confidentiality
vi) Enhancing facilitative dialogue and avoiding legal evaluation

**7. The PSSRB's protocol for mediation should include a standard mediation agreement.**

This should incorporate provisions defining the role of the mediator, establishing mediator confidentiality, including stating clearly the "without prejudice" basis of settlement discussion and rules regarding confidential information revealed in private caucus.

Providing a standard set of mediation terms will ensure that the parties understand the process and how it differs from adjudication at the PSSRB thereby providing greater clarity and increasing confidence in the process.

**8. Where appropriate settlement agreements should include provisions which describe necessary steps required to carry out the settlement terms and establish time lines for compliance.**

This is an important element of a durable agreement and should be incorporated into the basic mediation training.

**9. The PSSRB should provide information to the parties regarding enforcement procedures.**

A number of participants in the mediation pilot project expressed uncertainty about subsequent enforcement issues. Doubts about enforceability can undermine the credibility of the mediation process. It is important that the parties feel confident that any settlement agreement has the same force as an adjudicated outcome.

**10. The PSSRB should continue to monitor the effectiveness of the mediation process.**

In particular we recommend that the PSSRB should consider further longitudinal studies on party satisfaction and the impact of its grievance mediation on the conflict resolution climate in the workplace.

## Appendix A
## Focus Group Questions, June 2000

Introductions and explanation of the role of the evaluators, and the purpose of the focus group

**1. Procedural/ Logistical Matters**

a. How satisfied are you with the advance information provided to you (by the Board, by your reps) and how could this be improved?

b. How did you find the logistics (location, venue, scheduling) worked? Comments or complaints?

c. Length of sessions - some of the early data suggests that more than 6 hours is being spent on some mediations - in your experience is this in one session or over two sessions or more?

d. Early data also suggests that counsel is not often attending mediation (or else they just don't fill out our forms) - comments on this? What reasons did lawyers give for not attending? What if any impact do you think there is on the process? Do you think lawyers should be there?

e. Any other logistic/procedural matters anyone wants to comment on?

**2. The Mediation Process**

a. What is your view of the effectiveness and skillfulness of the mediator(s) you have worked with?

b. Were you satisfied that your mediator acted neutrally and without bias?

c. Did your mediator give any legal advice on the possible outcome before the Board? Did you ask for this? How did you feel about the mediator providing such advice? Was this in caucus or in joint session?

d. How did you feel about the choice of format in your mediation(s)? Early data suggested many different practices and many different preferences on this.. Would you prefer to spend more time in private caucus/more time in joint session and why?

e. To the repeat players: what did you know by your second or third experience of mediation with the PSSRB pilot that you did not know the first time you participated which had an impact on the way you participated/strategised?

f. Any other comments on your experience with the mediation process?

**3. Outcomes**

a. Early data suggested that for employees in particular, sometimes where mediation settled the legal issue(s) they felt outstanding matters which were important to their workplace relationships remained. What is your comment on this? Does anyone share this view/ this experience?

b. Where mediation did not resolve the issue(s), was it nonetheless helpful in narrowing this issues? Or did it in any cases make matters worse, in your view?

c. Regardless of whether or not mediation resulted in a settlement, what impact would you say it has had on your relationship with your employer/employee?

d. Repeat players question (see above at (e))

**4. Conclusion**

In one minute, what advice would you give to fellow employees/ employers on participating in the PSSRB pilot mediation program?

## Appendix B Questionnaires

**Public Service Staff Relations Board Grievance Mediation Pilot Project**

**Party and Party Representative Questionnaire**

The Public Service Staff Relations Board (PSSRB) is a quasi-judicial statutory tribunal responsible for the administration of a system of grievance adjudication in the Public Service. The PSSRB has begun a Pilot Grievance Mediation Project offering mediation prior to adjudication in cases involving disciplinary action and interpretation of collective agreement provisions. The Pilot Grievance Mediation Project will be evaluated on an ongoing basis from September 1999 to September 2000 by the evaluation team of Dr. Julie Macfarlane, John Manwaring and Ellen Zweibel, university law professors with considerable experience with programme evaluation.

Please take a few minutes to complete this questionnaire and return it to us in the envelope provided. All responses will remain strictly confidential. Only the evaluation team will have access to individual questionnaire responses and the results will be analyzed so that no individual can be identified.

If you require further information please do not hesitate to contact the evaluation team.


| Julie Macfarlane | John Manwaring | Ellen Zweibel |
|---|---|---|
| (519) 2534-4232 ext 2962 | (613) 562-8500 ext 3332 | (613) 562-8500 ext 3303 |
| juliem@gamma.uwindsor.ca | jamanwar@uottawa.ca | ezweibel@uottawa.ca |


**Section One : Background and Set-up**

Please provide the Case File Number: _____

You are (please check)
- ❑ the grievor
- ❑ the grievor's representative
- ❑ a lawyer representing the grievor
- ❑ the employer
- ❑ the employers' representative
- ❑ a lawyer representing the employer

This dispute is over
- ❑ Interpretation of a collective agreement provision
- ❑ Financial Penalty
- ❑ Suspension
- ❑ Termination

Please circle applicable response(s)

1. Was this your first experience of mediation in any context? If you have participated in a mediation before, *either* at the PSSRB *or* elsewhere, please tell us what that experience was.

My first experience of mediation

Not my first experience of mediation

_____

_____

2. Has this case been through any internal departmental conflict resolution process prior to being referred to mediation at the PSSRB?

Yes

No

If yes, please describe that process briefly.

_____

_____

3. Did you have enough information about the purpose of this mediation session and how it would proceed in advance of the session? If no, please state what further information would have been helpful to you.

Yes

No

_____

_____

4. Were you satisfied with the logistical arrangements for the mediation? (e.g. scheduling, notice given, location, other) If NO, please state what could have been improved and how.

Yes

No

**Section Two : Outcome**

5. Did the mediation session result in

Full agreement

Agreement on some but not all issues

No agreement

No agreement but a commitment to meet again for the purpose of mediation

6. If the mediation did not result in either full or partial settlement, did it narrow the issues?

Yes

No

7. If the mediation did not result in either full or partial settlement, what would you identify as THE THREE MOST SIGNIFICANT REASONS for the failure to fully resolve the dispute?

- ❑ the mediator was not effective
- ❑ the other side did not participate in good faith
- ❑ the factual issues were too complex and remained in dispute
- ❑ the legal issues were especially complex
- ❑ the parties were very hostile towards one another
- ❑ the representatives were very hostile towards one another
- ❑ one or both parties had unrealistic expectations of settlement
- ❑ the possibilities for a resolution were exhausted in an earlier internal conflict resolution process, prior to mediation at the PSSRB
- ❑ one or both sides were inadequately prepared for a constructive discussion regarding settlement

❑ the information presented by the other side was not credible

Please add any further comments:

_____

_____

8. If the matter did settle, in full or in part, did the resolution include an element that, in your experience, would not have been available through the adjudication process in this case?

Yes

No

Not sure

If Yes, please explain

_____

_____

9. In your view, did the mediation session clarify your/ your party's understanding of the other side's perspective in this dispute?

Yes, definitely

Yes, somewhat

No

Not sure

10. In your view, as a result of this mediation session, is the relationship between this employee and this employer likely to be

Worse

Better

Unchanged

Any further comments?

_____

11. Did your experience in this mediation session with the other party make you

Skeptical about mediating with this other party in a future PSSRB mediation session

Optimistic about mediating again with this other party in a future PSSRB mediation session

Not sure

**Section Three : Process**

12. Overall, would you say that the mediation process was

Very Fair

Somewhat Fair

Somewhat Unfair

Very Unfair

If you have answered 'Somewhat Unfair' or 'Very Unfair', please explain your answer.

13. How would you assess the role played by the mediator?

Very Effective

Effective

Ineffective

Very Ineffective

If you have answered 'Ineffective' or 'Very Ineffective', please explain your answer.

14. How well would you say that the mediator understood your/your party's view of this dispute?

Very well

Somewhat

Not at all

15. How effective was the mediator in helping the parties communicate with one another and reach some common understandings?

Very Effective
Effective
Ineffective
Very Ineffective
If you have answered 'Ineffective or 'Very Ineffective', please explain your answer.

_____

_____

16. In the mediation session, did the mediator (please check all that apply)

- ❑ advise you of his or her views of any legal issues
- ❑ recommend a particular settlement to you
- ❑ suggest possible options for settlement
- ❑ keep silent on his or her views on the case
- ❑ keep control over the structure and flow of the discussions
- ❑ avoid the appearance of bias or favouritism for or against either party

17. What if anything would you have liked the mediator to have done differently? For example, which if any of the above did the mediator **not do** but you would have preferred that s/he **had done**?

_____

_____

18.(A) How long was your mediation session?

More than 6 hours
3 - 6 hours
Less than 3 hours

(B) And was this

About right
Too long
Too short?

19. Do you feel that selecting your own mediator would have been beneficial to the parties? If yes, please say why.

Yes

No

_____

_____

20. Did you feel that you had sufficient opportunity to have your say?

Yes

No

If you answered No, please explain what prevented you from having your say

_____

_____

**Section Four : Future**

21. Would your experience in this mediation session make any difference to how you would deal with another case which you knew could eventually be referred to mediation at the PSSRB? (including, for example, whether you would be more inclined to access another, earlier internal conflict resolution process?)

Yes

No

If you answered Yes, please explain your answer

_____

_____

22. Would you chose to use mediation again at the PSSRB?

Yes, definitely
Yes, probably
No
Don't know

23. *You have been asked to pre-test this questionnaire prior to its use in the grievance mediation pilot project beginning September 30, 1999. Do you think any changes should be made?*

_____

_____

*Thank you for your assistance in completing this questionnaire*

**Mediator Questionnaire**

The PSSRB has begun a Pilot Grievance Mediation Project offering mediation prior to adjudication in cases involving disciplinary action and interpretation of collective agreement provisions. The Pilot Grievance Mediation Project will be evaluated on an ongoing basis from September 1999 to September 2000 by the evaluation team of Dr. Julie Macfarlane, John Manwaring and Ellen Zweibel, university law professors with considerable experience with programme evaluation.

Please take a few minutes to complete this mediator questionnaire and return it to us in the envelope provided. All responses will remain strictly confidential. Only the evaluation team will have access to individual mediator questionnaires and the results will be analyzed so that no individual can be identified.

If you require further information please do not hesitate to contact the evaluation team.


| Julie Macfarlane | John Manwaring | Ellen Zweibel |
|---|---|---|
| (519) 2534-4232 ext 2962 | (613) 562-8500 ext 3332 | (613) 562-8500 ext 3303 |
| juliem@gamma.uwindsor.ca | jamanwar@uottawa.ca | ezweibel@uottawa.ca |


**Section One : Background**

Please provide the Case File Number _____

The mediation was attended by
- ❑ the grievor
- ❑ the grievor's representative
- ❑ a lawyer representing the grievor
- ❑ the employer
- ❑ the employers' representative
- ❑ a lawyer representing the employer
- ❑ other _____

This dispute is over

- ❑ Interpretation of a collective agreement provision
- ❑ Financial Penalty
- ❑ Suspension
- ❑ Termination

**Section Two : Outcome**

1. Did the mediation session result in

Full agreement

Agreement on some but not all issues

No agreement

No agreement but a commitment to meet again for the purpose of mediation

2. If the mediation did not result in either full or partial settlement, did it narrow the issues?

Yes

No

3. If the mediation did not result in either full or partial settlement, what would you identify as THE THREE MOST SIGNIFICANT REASONS for the failure to fully resolve the dispute?

- ❑ one or both parties did not participate in good faith
- ❑ the factual issues were too complex and remained in dispute
- ❑ the legal issues were especially complex
- ❑ the parties were very hostile towards one another
- ❑ the representatives were very hostile towards one another
- ❑ one or both parties had unrealistic expectations of settlement
- ❑ mediation at the PSSRB added nothing further to an earlier internal conflict resolution process
- ❑ one or both sides were inadequately prepared for a constructive discussion regarding settlement
- ❑ the information presented by one or both parties was not credible

Please add any further comments:

_____

4. If the matter did settle, in full or in part, did the resolution include an element that, in your experience, would not have been available through the adjudication process in this case?

Yes

No

Not sure

If Yes, please explain

5. In your view, did the mediation session clarify the parties' understanding of each other side's perspective in this dispute?

Yes, definitely

Yes, somewhat

No

Not sure

6. In your view, as a result of this mediation session, is the relationship between this employee and this employer likely to be

Worse

Better

Unchanged

Any further comments?

7. In the mediation session, did you (please check all that apply)

- ❑ advise one or both parties of your views of any legal issues
- ❑ recommend a particular settlement
- ❑ suggest possible options for settlement
- ❑ keep silent on your views of the case
- ❑ keep control over the structure and flow of the discussions
- ❑ avoid the appearance of bias or favouritism for or against either party

8. (A) How long was the mediation session?

More than 6 hours

3 - 6 hours

Less than 3 hours

(B) And was this

About right

Too long

Too short?

*10. You have been asked to pre-test this questionnaire prior to its use in the grievance mediation pilot project beginning September 30, 1999. Do you think any changes should be made?*

_____

_____

*Thank you for your assistance in completing this questionnaire.*

**Footnotes**

1. Essentially this evaluation is an assessment of the impact of the mediation pilot on the "normal" patterns of settlement at the Board. For a discussion of so-called `impact' assessment, see Ross, P. & Freeman, H. *Evaluation : A Systematic Approach*, SAGE 1993, 5th edition at chapter five and see also below, "control group".
2. See Patton, M. *Qualitative Evaluation and Research Methods* Sage 1990 2nd edition and Rolph, E. & Moller, E. in *Evaluating Agency ADR Programs: a User's Guide to Data Collection and Use* Rand Institute for Civil Justice, 1994 at 5
3. See Patton, M. *Qualitative Evaluation and Research Methods* 2nd edition Sage 1990.
4. See for example Hammersley, M. & Atkinson, P. Ethnography : Principles in Practice (1983) 198-200.
5. Hamilton, D. *Evaluation*, Open Books, London, 1976
6. Krueger, R. *Focus Groups : A Practical Guide for Applied Research* Sage 1994
7. McEwen, C. & Mainman, R. `Small Claims Mediation in Maine : An Empirical Assessment' 33 Maine Law Review (1981) 244.
8. Barkai, J. & Kassebaum, G. `Using Court-Annexed Litigation to Reduce Litigant Costs and to Increase the Pace of Justice' 16 Pepperdine Law Review (1989) 43.
9. See Tomain, J. & Lutz, J.A. `A Model for Court-Annexed Mediation' 5 Ohio State Journal on Dispute Resolution (1989) 1.
10. A measure of quality sometimes described as "process-integrity" ie matching the form and fulfilling the potential of the dispute resolution method. See Baruch Bush, R. `Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' 66 Denver University Law Review (1989) 335 at 338.
11. Tyler, T. `The Quality of Dispute Resolution procedures and Outcomes : Measurement problems and Possibilities' 66 Denver University Law Review (1989) 419 at 432-433.
12. There has been considerable speculation, although little consistent evidence, that variables such as case type and party type may have a demonstrable impact on settlement patterns. See for example, Trubek, David M.; Sarat, Austin; Felstiner, William L.F.; Kritzer, Herbert M.; Grossman, Joel B., "The Costs of Ordinary Litigation", 31 UCLA Law Review (1983), 72 especially pp95-97. There are however a number of methodological problems with such comparisons, including the innumerable variables in the implementation of any given process designed to expedite settlement (for example by different mediators at the Board) . Similarly, within any classification of case type, however detailed, there are inevitably many variables - for example, how much money is at stake, whether litigants are acting in person or in a corporate capacity, what is the quality of legal representation - that may critically affect settlement outcomes. An external classification of dispute type also overlooks the fact that the disputants themselves may `redefine' the issues if they choose to settle the conflict consensually. See Galanter, Marc & Cahill, Mia, " 'Most Cases Settle': Judicial Promotion and Regulation of Settlements", 46 Stanford Law Review (1993-94), 339 Even where a correlation has been found between a particular case type and a particular settlement format, it may be difficult to establish causality. For example, the Ontario Pilot Evaluation found that a higher number of wrongful dismissal cases settled in mediation than other case types. It was hypothesised that the explanation for this was that a higher percentage of wrongful dismissal cases were mandated into mediation, and that as a consequence, the wrongful dismissal Bar had become skilled at dealing with cases in

mediation; and also that the legal issues involved in wrongful dismissal cases were fairly well settled and the contentious issue limited to determining quantum. See Macfarlane, J. Court-Based Mediation in Civil Cases : An Evaluation of the Toronto General Division ADR Centre.' Ontario Ministry of the Attorney-General, 1995, at pp4-8 and Tables 1-7

13. On the use of control groups generally in ADR program evaluation, see Tyler, T. 'The Quality of Dispute Resolution procedures and Outcomes : Measurement problems and Possibilities' 66 Denver University Law Review (1989) 419 at 421.

14. The same problem was faced by McEwen in his evaluation of the United States Equal Employment Opportunity Commissions's grievance pilot for the agency: see McEwen, C. *An Evaluation of the Equal Employment Opportunity Commissions's Pilot Mediation Program* Bowdoin College, 1994; and by Kochan et al in evaluating the Massachusetts Commission Against Discrimination's pilot : see Kochan, T. Lautsch, B. & Bendersky, C. "An Evaluation of the Massachusetts Commission Against Discrimination's Alternative Dispute Resolution Program" Harvard Negotiation Review (2000) 23.

15. Bingham, L "Mediating Employment Disputes : Perceptions of Redress at the United States Postal Service" Review of Public Personnel Administration Spring 1997, 20 at 26.

16. Lind, A., Kanfer, R. & Earley, P.C. "Voice, control and procedural justice: instrumental and non-instrumental concerns in fairness judgments" 59 Journal of Personality and Social Psychology (1990) 952.

17. See Macfarlane, J. *Court-Based Mediation in Civil Cases : An Evaluation of the Toronto General Division ADR Centre*. Ontario Ministry of the Attorney-General, 1995, at p57 (25% of mediators marking "unrealistic expectations" as "very significant" as a barrier to settlement in cases that both did and did not resolve in mediation).

18. See the results recorded by Sylvia Stratek in her 1988 evaluation of the grievance mediation at the Washington Education Association. Stratek, S. "Grievance Mediation : Does it Really Work?" Negotiation Journal (2000) 269 at 274.

19. See Bingham, L. above note 15 at 26-27.

20. For example, the Ontario Mandatory Mediation Program, an opt-out program which requires an initial three hour meeting between the parties, reported a settlement rate of 40% in Jnuary 2001 based on statistics for the previous 18 months (Communique, January 2001, Ontario Ministry of the Attorney-General). McEwen's 1994 evaluation of the Equal Opportunity Commission's pilot mediation program (see above note 14) recorded a settlement rate of 52%. Kochan, Lautsch & Bendersky's 2000 evaluation of the Massachusetts Commission Against Discrimination ADR program (see above note 14) recorded a 62% settlement rate in mediation. While private mediation programs often report much higher settlement rates of closer to 90%, these are a less suitable comparison group for the PSSRB mediation pilot because they tend to involve highly motivated disputants and much longer periods of time devoted to mediation in each case (limited only by the parties willingness to pay).

21. See for example Thibaut J, Walker, L.. LaTour, S. & Houlden, S. 'Procedural Justice as Fairness' 26 Stanford Law Review (1974) 1271; Thibaut, J. & Walker, L. *Procedural Justice : A Psychological Analysis* New York, Erlbaum, 1975; and Tyler, T. 'The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience' (1984) 18 Law & Society Review 51.

22. See for example, Hodges, A.C. "Mediation and the Americans With Disabilities Act" Georgia Law Review (Winter 1996).

23. While the small number of parties reporting non-settlement does not allow a conclusion to be drawn on this correlation, it is consistent with other studies that tend to show that "procedures followed, rather than outcome obtained, have the greater influence on the overall evaluation of dispute-resolution systems." Folger, R. & Greenberg, J. "Procedural Justice : An Interpretive Analysis of Personnel Systems" in *Research in Personnel and Human Resources Management* Rowland, K. & Ferris, G. (eds) volume 3, JAI Press 1985 at 141-183.

24. For example, "The mediator approached the employer like he was adjudicating the case lawyer - like, did not appear to be impartial - somewhat intimating"; "Pressure cooker..Both parties settled but felt we needed a shower".

25. See Hodges, A.C. "Mediation and the Americans With Disabilities Act"above note 23.

26. Of the 19 grievors who said they had insufficient information, 47 % (n=9) gave qualified fairness ratings. The conclusion that greater mediation experience correlates with more positive views about mediation is consistent with the conclusions of John Lande's recent study of lawyers; see Lande, J. "Getting the Faith :Why Lawyers and Executives Believe in Mediation" 5 Harvard Negotiation Law Review (2000) 137 at 177-178.

27. *An Evaluation of the Equal Employment Opportunity Commission Mediation Program* (2000), McDermott, P. Obar, R., Jose, A., & Bowers, M. "Literature Review" at pp. 3-4 (www.eeoc.gov/mediate/report).

28. Several of the comments linked ineffectiveness to other aspects of the process, rather than the mediator's role or conduct in the session. For example one respondent who choose "very ineffective" did so "Because the other party was not in a position of authority", and another stated that "the situation being grieved was more the cause than the mediator". This was also true in the comments to question 15 where for example one respondent who checked "ineffective" said "But not through lack of trying. The complainant was simply not ready to mediate".

29. In one of the comments to question 10 (regarding the effect of the mediation session on the relationship) a grievor suggested that the shuttle diplomacy approach may have contributed to the worsening of the relationship. "I know it made me feel very bitter towards the employer, I don't know how they feel. This was all done through the mediator it was nothing the department said directly to me." As a result of the caucus format, the grievor was unaware of what was being discussed with other party in order to promote settlement.

30. For a excellent overview of the effective use of caucus as well as criticism of it, see C. Moore, *The Mediation Process* 2d ed. (San Francisco: Jossey-Bass, 1996) at 319-26. See also K. Kelly, "How to Use Caucus Effectively" (Ontario: Canadian Bar Association, Institute of Continuing Legal Education, 1996).

31. See generally C. Menkel-Meadow, "The Many Ways of Mediation" (1995), 11 Negotiation Journal 217 reviewing Deborah Kolb's *When Talk Works* (San Francisco: Jossey-Bass, 1994) and R. Bush and J. Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994); and Leonard L. Riskin, "Mediation Orientations, Strategies and Techniques" (1994) 12 Alternatives 111.

32. For discussion of this issue and other issues related to the facilitative-evaluative debate see: John Bickerman, "Evaluative Mediator Responds", 14 Alternatives (1996); J. Michael Keating, "Mediating in the Dance for Dollars", 14 Alternatives (1996); Kimberlee K. Kovach & Lela P. Love, ""Evaluative" Mediation is an Oxymoron", 14 Alternatives (1996); Leonard Riskin, "Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed", 1 Harv. Neg. Rev. 7 (1996); James J. Alfini, "Evaluative Versus Facilitative Mediation: A

Discussion", 24 Fla. St. U. L. Rev. 919 (1997); Jeffrey W. Stempel, "Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role", 24 Fla. St. U. L. Rev. 949 (1997); and "Symposium" 2 Journal of Dispute Resolution, (2000) 245-371.

33. There was some correlation between a mediator giving legal advice and the respondent perception that the mediator had not avoided bias (n=56). 43% of those who felt there was some mediator bias also indicated that the mediator had provided legal advice.

34.The mediators report mediations lasting in excess of 6 hours slightly more frequently (56%) than the other respondents (42-44%). There is no apparent explanation for this difference in perception.